

IN THE HONORABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA SITTING INO
ITS MARCH TERM A.D. 2017

BEFORE HIS HONOR FRANCIS S. KORKPOR, SR CHIEF JUSTICE
BEFORE HIS HONOR KABINEH M. JA'NEH ASSOCIATE JUSTICE
BEFORE HER HONOR JAMESETTA H. WOLOKOLIE ASSOCIATE JUSTICE
BEFORE HIS HONOR PHILIP A.Z. BANKS, III ASSOCIATE JUSTICE
BEFORE HER HONOR SIE-A-NYENE G. YUOH ASSOCIATE JSUTICE

James D. Marfarlon of the Monrovia Central Prison)
Monrovia, Liberia..... APPELLANT)

Versus)

APPEAL)

Republic of Liberia by and thru the Ministry of
Justice APPELLEE)

GROWING OUT OF THE CASE:)

Republic of Liberia by and thru the Ministry of
Justice PLAINTIFF)

Versus)

CRIME:
RAPE)

James D. Marfarlon of the Monrovia Central Prison)
Monrovia, Liberia DEFNDANT)

HEARD: November 16, 2016

DECIDED: September 29, 2017

MADAM JUSTICE YUOH DELEVERED THE OPINION OF THE COURT

This appeal grows out of a final judgment rendered by the 1st Judicial Circuit Court, Criminal Assizes "E", against the appellant, James Marfarlon, defendant in the court below, for the crime of Rape. The records show that at the time that the crime was allegedly committed, the appellant was 20 (twenty) years old and the private prosecutrix 10 (ten) years old. For the purpose of protecting the private prosecutrix and concealing her identity, she being a minor when the crime was allegedly committed, we shall herein refer to her as the private prosecutrix.

We quote herein below the indictment which incorporates the State's theory of the case as follows:

INDICTMENT

The Grand Jurors for the County of Montserrado, Republic of Liberia, upon their oath do hereby find, more probably than not, that the Defendant James D. Marfarlon committed the crime of rape to wit:

1. *That the victim and the defendant are neighbors and they both lived in Beer Village, 72nd Community in Montserrado County.*
2. *That on the night of Friday, February 18, 2011, the victim along with her brother and the defendant was watching a movie in the defendant's house.*
3. *That whilst they were all watching the movie, the victim's brother went outside to chat with his friend.*

4. That the victim and the defendant were left alone watching the movie, when the generator they were using went off.
5. That the defendant left the house to put the generator back on.
6. That when the generator did not come back on, the victim decided to leave the defendant's house.
7. That while the victim was on her way outside out of the defendant's house, he held [restrained or prevented] her from leaving and carried her back inside his house.
8. That the defendant undressed the victim and also undressed himself and had sexual intercourse with the victim by inserting his penis in the victim's vagina. The victim bled and since the defendant's sexual intercourse with her, she has always seen blood coming out of her vagina.
9. That the victim's brother returned to the house after eating and tried[sought entrance into] entering the house to rejoin his sister, but the defendant shouted at him and his friend and they immediately left the scene.
10. That on Sunday, February 20, 2011, the victim's father noticed that her clothes were soiled with blood. When asked about what was wrong with her, she informed her parents that it was the defendant who had sexual intercourse with her.
11. That the victim was taken to the JD (James Davies) Memorial Hospital where the victim was examined by a Certified Midwife.
12. That at the time of the relevant acts, the victim was ten (10) years of age and the defendant was an adult, twenty (20) years of age.
13. Sexual intercourse means penetration, however slight, of the vagina, anus or mouth, or any other opening of another person by the penis, or; penetration, however slight, of the vagina or anus of another person by a foreign object or any other part of the body (other than the penis).
14. That a person who has sexual intercourse with another person (male or female) has committed rape if:
 - a) (i) He intentionally penetrates the vagina, anus, mouth or any opening of another person (male or female) with his penis, without the victim's consent.
 - (ii) He/she intentionally penetrates the vagina or anus of another person with a foreign object or with any other part of the body (other than the penis), without the victim's consent.
 - b) That the victim is less than eighteen (18) years old, provided that actor is eighteen (18) years or older.
15. That the acts of the defendant was in violation of Chapter 14, Section 14.70 of the New Penal Code of Liberia (approved December 29, 2005), which provides

that sexual intercourse is rape where the defendant intentionally penetrates the vagina, anus mouth or any other opening of another person (male or female) with his penis, without the victim's consent; or where the defendant intentionally penetrates the vagina or anus of another person with a foreign object or with any other part of the body (other than the penis) without the victim's consent; or where the victim is less than eighteen (18) years old and the actor is eighteen (18) years of age or older.

TRUE BILL/IGNORAMUS

Witness:

- 1. Victim*
- 2. Victim's Stepfather*
- 3. Victim's brother*
- 4. Sylvia Molubah (Nurse Examiner)*
- 5. Det. Emmanuel Suwon*

Documentary Evidence:

*S. Gayflor Mulbah
Foreman of the Grand Jury*

*Cllr. J. Daku Mulbah
County Attorney, Montserrado County*

On September 3, 2012, at the arraignment, and upon ascertaining from the appellant as to his representation by counsel and being convinced of his inability to obtain the services of a private lawyer, the trial court appointed Counsellor Sunifu Sherif, a Public Defender who accepted to represent the appellant. Thereafter, the indictment was read to the appellant in open court, whereupon he pleaded not guilty to the charge of Rape, thus joining issues with the State.

Subsequently, trial commenced with the State producing five (5) witnesses including, the private prosecutrix, her brother, her stepfather, the Police Investigator, Sergeant Emmanuel Suwon, and a Certified Midwife, Madam Sylvia Molubah, who had examined the private prosecutrix at the James Davies Memorial Hospital and prepared the Medical Report. These witnesses, with the exception of the certified midwife, all testified to the averments contained in the indictment.

The State first witness, the private prosecutrix testified that she was born on December 8, 2000; that she is 12 years old; that she is in the 6th grade; that two years earlier, that is, on February 18, 2011, without her consent, the appellant forcefully inserted his fingers and penis into her vagina, thus raping her. Quoted herein below are relevant answers by the private prosecutrix during direct examination by the State:

"Q: Madam Witness, you said in 2011, you were living in [the] Beer Village [community][and] while you were living there, did you happen to know a boy [man] by the name of James Marfarlon?

A: Yes.

Q: Since you said you know him, how did you get to know him?

A: He was living in his mother house and he raped me.

Q: Madam Witness, you testified that you know James Marfarlon, please identify him in this court?

A: He is wearing an orange shirt.

Q: *Madam Witness, my next question to you is, since you testified that James Marfarlon raped you, what do you mean by 'he raped you'?*

A: *He did rude-rude thing to me.*

Q: *When you testified that 'he did rude-rude things what did he use to rape you?*

A: *He use his to-to in my ta-ta*

Q: *Where is his to-to?*

A: *In front of him.*

Q: *Where is your ta-ta?*

A: *In front of me*

Q: *Madam Witness please stand up and point to your ta-ta?*

A: *Here it is.*

Q: *Madam Witness, what happened before he put his to-to in your ta-ta?*

A: *It was on Friday, February 18, 2011; it was me, James and my brother; we were watching show [a movie]. My brother's friend called him outside to eat. While he was eating we [private prosecutrix and the appellant] were watching show [a movie] in James' room. After my brother finished eating, he went behind our house to watch show. While watching show, the generator went off. James said he was going to the generator room to put the generator [back] on. The generator could not come on. While I was coming outside, James was coming from the generator room, entering his room. He then held my mouth and carried me inside and started doing rude-rude thing to me.*

Q: *Madam Witness, when James was doing rude-rude thing to you, what happened next?*

A: *I was shouting and fighting but he held my mouth [covered my mouth with his hand]; and my voice could not come out [not be heard]."*

The private prosecutrix was thereafter cross examined by the appellant's lawyer as to the attempt by her brother to re-enter the appellant's room and we quote herein below the question asked and the private prosecutrix' answer, to wit:

"Q: *Madam Witness, am I correct to say that after your brother returned from eating with his friend he came back to the house?*

A: *My brother wanted to enter the room to come inside, but James shouted at him 'get outside; you must not enter this room!' "*

The testimony of the private prosecutrix as to her brother's attempt to re-enter the appellant's room was corroborated by the State's second witness, her brother. We quote below the witness' testimony regarding this issue.

"On the night of February 18, 2011, I was in James' room watching show [a movie] with my sister and James. My friend called me to eat. After eating I attempted going back to James' room but, James shouted at me; he said I should not enter the room. So, I went outside to my friend to watch show [a movie]."(See page 57 of the certified records.)

Thereafter, the State introduced its third witness, the private prosecutrix step father, who testified that while assisting his wife with the laundry of their children, the clothing of the private prosecutrix was observed to be stained with blood; that when questioned as to the blood stain discovered on her clothing, the private prosecutrix informed them that the appellant had raped her. The relevant portion of the witness' testimony reads thus:

"On Sunday morning, I was [at] home that morning; I did not go to church and my wife decided to help the children wash their clothes. It was during this time, I myself was helping to wash their clothes. My wife noticed blood in the trousers of our daughter; and she called my attention, saying that she did not know our daughter has started receiving [menstruating] and she noticed blood on our daughter's trousers. That [statement] caught my attention and my friends advised me to take our daughter to a mid-wife. It was based on my friends' advice that I decided to contact our daughter's aunty instead of going to the mid-wife directly since we did not have money [to pay a midwife to conduct an examination]. Her aunty and my wife took her into the room and questioned her; after their discussion they returned and reported that our daughter was raped and that it was James that tampered with her [raped her]."

The State's fourth witness, Sergeant Emmanuel Swon of the Liberia National Police, Women and Protection Center, testified that he received a complaint from the private prosecutrix step father, alleging that his 10 year old daughter had been raped; that he took delivery of the blood-stained clothing of the private prosecutrix; that he commenced an investigation into the complaint, taking statements from the private prosecutrix, her brother, the appellant, and other persons of the community; that the private prosecutrix was taken to the James Davis Memorial Hospital for medical examination and at the end of the investigation the appellant was charged with the commission of the crime of rape.

The State's fifth witness, Savior Mulbah, the Certified Midwife testified that she physically examined the private prosecutrix on February 21, 2011 at the James Davies Memorial Hospital; that as a result of the examination she discovered that the private prosecutrix was raped and that a medical report was prepared as per the physical examination conducted on the private prosecutrix. Quoted herein below is a relevant portion of the Midwife's testimony:

"On February 21, 2011, BB [initials used in order to protect the identity of the private prosecutrix, as she was a minor] came to our unit, the sexual violence unit. She complained that she was raped by a man. She said while watching show the generator went off. After that, he [James Marfarlon] went out to put the generator on. She waited for a little while and decided to go out. On her way out of the room this man held her hand; took her back in the room; fingered her; lay over her and put his penis into her tata."

As to the physical or external examination conducted on the private prosecutrix, the witness testified that she examined the private prosecutrix from her head to her toes; that she inspected the private prosecutrix abdomen, her vagina and that she listened to the private prosecutrix narrative regarding the events of February 18, 2011. We quote

herein below relevant excerpts of the witness' testimony regarding the examination performed on the private prosecutrix:

"Q: What was the procedure you carry out?

A: I started by asking the survivor to give me her history; what brought her to the sexual violence unit and she told me that she was raped by a fellow on February 18, 2011, and she came to the unit on the 21st of the same month. After I got her story I did my examination from head to toe, I did not see anything abnormal at the outside. But when I reach to her genital area during my examination, I saw that the vulva was normal, no cut no bruises. I got to the hymen, no hymen was seen on that day and her internal organ was protruding through the vagina. When I got to the vagina there was an offensive odor with whitish discharges and I documented all what I saw. After the examination I prepared a medical report that was given to the survivor's relatives and later sent the survivor to a safe home."

We have reproduced herein below certain sections of the Medical Report which we deem pertinent to this appeal:

"Ministry of Health and Social Welfare
Republic of Liberia
MEDICAL REPORT

Section 5: Patient's Description of Penetration				
Penetration by	Yes	No	Not sure	Description of penetration including what part of patient's body was penetrated
Penis	✓			According to survivor " he put his toto in my tata"
Finger	✓			According to survivor " he put his finger in my tata"
Object		✓		According to survivor " no object used"
Condom used			✓	According to survivor " I don't know"

Section 6: Forensic Evidence Collection					
Complete the following section if patient arrives for treatment within 72 hours of incident and forensic evidence is collected					
After incident, did patient	Yes	No		Yes	No
Vomit?		✓	Change clothes?	✓	
Urinate?	✓		Wash, shower or bath?	✓	
Defecate?	✓		Use a pad or tampon?	✓	
Rinse mouth?	✓		Engage in consensual sexual intercourse?		✓

Prior to incident, when was the last time patient engaged in sexual intercourse?
According to survivor, she has never engaged in sexual intercourse. She is a minor.
Are there any medical complaints related to the incident? If so, describe:
Yes, vagina bleeding, headache, stomach pain

Name and Signature or Finger Print of Patient: Survivor	
Signature of Examiner:	Title: Certified Midwife
Facility: JDJ Memorial Hospital	Date: February 21, 2011

Section 7: Medical Examination			
Height: 131 cm	Weight: 28 kg	Leave blank	
Pulse:	BP:	Resp. rate"	Temp: 38°C
Head & Face: One white scar seen over right eye, no cut, no bruises seen		Mouth & Nose: Normal	
Eyes & Ears: Conj. Pink, no cut, no bruises seen		Neck: Normal	
Chest: Clear & Normal, no cut, no bruises seen		Back: Normal	
Abdomen: Painful at lower site, no cut, no scar, no bruises seen		Buttocks: Normal	
Arms & Hands: Normal		Legs & Feet: Normal	

Appearance: (state of clothing, hair, etc.) Neat & clean

Mental Status (as observed by examiner i.e. crying, (calm,) agitated, etc.)
Calm

Name and Signature or Finger Print of Patient: Survivor

Signature of Examiner:

Title: Certified Midwife

Facility: JDJ Memorial Hospital

Date: February 21, 2011

Section 8: Genital Examination

Date of last menstrual period: Survivor have not started menstruating

Menstruating at time of incident: Yes No

Vulva/Scrotum: No cut, no scar, no bruises see	Hymen: Hymen not seen due to an organ that is protruding through the vagina
Anus/Rectum: No cut, no scar, no bruises seen	Vagina/Penis: Vagina very offensive with whitish discharge
Cervix (Speculum examination): Not applicable	Bimanual Pelvic Examination: Not applicable

Name and Signature or Finger Print of Patient: Survivor

Signature of Examiner:

Title: Certified Midwife

Facility: JD Memorial Hospital

Date: February 21, 2011"

Still testifying to the Medical Report during direct examination, Madam Mulbah stated that when she touched that part of the private prosecutrix lower abdomen, she observed that the private prosecutrix made such a facial expression, an indication that she was experiencing pain in that area of her body; that thereafter, she proceeded to examine the private prosecutrix' genitals, specifically the vulva, [the external part of the female genital organs] but did not observe any cuts or bruises to the vulva; that however, upon examination of the vagina, she observed that the hymen (the hymen is

a tin membrane covering the opening of the vagina while the internal organ of the vagina is the inner tissue of the vagina) could not be seen due to protrusion or bulging of the internal organ (the tissue) of the vagina; that the vagina had an offensive odor and whitish discharge, which the witness stated was a sign of infection within the vagina; that as to the probable cause of the said infection, the witness testified that it was due to lacerations caused by friction; that noting the private prosecutrix statement that the appellant had allegedly used his finger and penis in her vagina, she, the certified midwife stated that this was conclusive evidence that this was the cause of the friction that produced the lacerations and the outcome thereof was the infection, manifested by the offensive odor and the whitish discharge.

During the cross examination the witness confirmed that the private prosecutrix hymen was absent; that the said absence was a direct result of penetration and not exercise; and that the painful facial expression made by the private prosecutrix during the examination of her lower abdomen indicated that her vagina was penetrated by the appellant's fingers and penis.

When the State rested with evidence, the appellant took the stand and testified, confessing that he was a notorious criminal within his community; that he had been incarcerated on several occasions for the commission of theft and criminal mischief; but notwithstanding his criminal notoriety, he did not commit the crime of rape as was alleged in the indictment. In his attempt to prove his innocence the appellant presented an alibi defense as the reason why he could not have committed the crime of rape. Given the significance of the appellant's alibi defense, we have decided to quote herein below relevant answers by the appellant during direct examination:

"Q: Mr. Witness, on the 18th of February between 8:30-9PM where were you?"

A: I was on the 72nd Boulevard, watching a football game in a video club.

Q: Mr. Witness, on the 18th of February, where was your generator especially during the night hours?"

A: Before that night, I rented my generator out to a friend of mine.

Q: Mr. Witness, for the benefit of this court and jury, please name the person to whom you rented your generator?"

A: I rented my generator to a friend of mine name Adama.

Q: Mr. Witness, what date did you give your generator to Adama whom you said is your friend?"

A: I gave my generator to Adama on Thursday, February 17, 2011, after Arsenal v. Barcelona game.

Q: Mr. Witness when was the last time you turned your machine on?"

A: February 16, 2011, the day Arsenal and Barcelona played.

During cross examination the appellant's defense was rigorously tested by the State's prosecutors and the end results of this exercise revealed that February 16, 2011, was not the last date the appellant had used his generator; and that the appellant did not give the generator to his friend Adama on February 17, 2011. Quoted herein below are responses by the appellant during cross examination:

"Q: *Mr. Witness, in your statement you said, 'on Wednesday, February 16, 2011, during Barcelona v. Arsenal game was the last night I ever turned my generator on. On that night my friends were with me, so I did not allow any children in my room. My friends who were present with me that night were Figo and his girlfriend, Ossuma, and his little brother, along with the pastor's son. That was the last night I turned my generator on. The next day, which was Thursday, [February 17, 2011] I went broke but that same night children came into my room from different houses and I demanded that they pay and they did.'* Mr. Witness, is this your statement also?

A: *Yes."*

In addition to this clear contradicting testimony quoted *supra*, the appellant's defense continued to shrink during the jury's examination when he confirmed that he left his house only on that Friday, February 18, 2011, to watch a game (soccer) at a video-club that he could not remember although he professed to be a lover of sports. We herein quote below the appellant's response to the jury's questions on this point.

"Q: *Mr. Witness, you said on Wednesday night you were in the video-club watching Arsenal v. Barcelona, which video-club was it?*

A: *I am a sport lover, on Wednesday night, Real TV showed the games, so I did not leave my house to go to the video club. But after I had given [rented out] my generator, it was Friday I went to the video-club to watch the game.*

Q: *Mr. Witness I want to know the name of the video-club on SKD Boulevard?*

A: *There is a video club right around the drugstore but I can't remember the name, it was there I watched the football game."*

Thereafter, the appellant's lone witness, Adama Kanneh, testified that he and the appellant did not share a close friendship; and that although he rented the appellant's generator he could not remember the exact date and month he rented the generator, but only that it was on a Thursday. Quoted herein below are relevant answers by the witness during direct examination:

"Q: *Mr. Witness, during the testimony of defendant James Marfarlon he told this court that there was some transaction that occurred between the two of you. My question to you Mr. Witness, was there any transaction that took place between you and James Marfarlon at any time?*

A: *Yes*

Q: *For the benefit of the jury and this court please state the transaction?*

A: *There was a transaction based on generator that was rented to me.*

Q: *Do you remember the date or the day on which the defendant gave you the generator?*

A: *I do not know the date but I know the day.*

Q: *Please state the day since you cannot remember the date you were given the generator?*

A: *It was on a Thursday*

During cross examination the witness testified that he and the appellant are not close friends and that he could not recall the exact month he rented the appellant's generator. We quote also herein below the witness' testimony on this point:

"Q: *Mr. Witness, can you remember the day you rented the generator?*

A: *It was on Thursday*

Q: *What month?*

A: *I cannot remember.*

Q: *How close are you and James?*

A: *James and I are not close he only comes to my [place of] business*

Q: *How often has he rented his generator to you?*

A: *James has never given me generator before that day.*

Q: *You said he gave his generator to you, not so?*

A: *Yes.*

Q: *What time?*

A: *I do not know the time.*

It is interesting to note that the testimony of Mr. Adama Kanneh did not corroborate the testimony of the appellant as to the time the generator was rented out; neither did he or any other witness confirm the appellant's presence at the video club on February 18, 2011, the date of the alleged rape of the private prosecutrix.

The quoted testimonies from the appellant and his lone witness, Mr. Adama Kanneh, represent the appellant's entire alibi and the grounds on which he strongly believed that he should have been acquitted of the crime of rape as he was not at his house on Friday, February 18, 2011 but at a video club. Given the potency of an alibi defense and its ramifications in a criminal trial, this Court will address the issue and the doctrine of an alibi and its applicability to this present case, later in this Opinion.

The records show that upon both the State and the appellant resting with evidence *toto*, the trial judge charged the jury on several points of law as was requested by both the State and the appellant, and thereafter, the jury retired to its room of deliberation. On October 15, 2012, the jury returned with a unanimous verdict of guilty against the appellant for the commission of the crime of rape.

On October 17, 2012, the appellant filed a motion for new trial on grounds that the verdict was contrary to the weight of the evidence; that the medical report, in stating the absence of bruises, scars, cut or laceration on the vagina of the private prosecutrix, was ground for an acquittal; that the testimonies of the State's witnesses did not corroborate, particularly with regards to the averments in the indictment; and that the trial court's failure to instruct the jury on the definitions of a unanimous-verdict of guilty, a not guilty verdict or a hung jury, contributed to the jury returning a unanimous verdict of guilty against him.

In its resistance, the State requested the trial court to deny the motion for new trial on grounds that the absence of bruises, scars, cuts and laceration on the private prosecutrix vulva, did not vitiate the fact that the rape did not occur; that there are no laws mandating that in order to prove rape, there must be the presence of bruises, scars, cuts or laceration in the area of the victim's vagina; that the trial judge properly instructed the jury before they retired into their deliberation room; and that the appellant had the opportunity by law to request the court to instruct the jury on any specific issues or point of law relevant to the appellant's defense.

The trial court denied the motion for new trial and on November 28, 2012, rendered final judgment confirming the jury's verdict that the appellant did commit the crime of rape against the private prosecutrix who was then 10 (ten) years old and sentenced him to a prison term of 10 (ten) years to commence as of the date of the appellant's arrest and confinement, that is, March 1, 2011.

The appellant excepted to the trial court's final judgment, announced an appeal to this Court and thereafter filed a 19 (nineteen) count bill of exceptions which was approved by the trial judge in consonance with law. We note that when the case was called for hearing before this Court, the lawyer from the Office of the Public Defenders who had represented the appellant during the trial at the lower court was absent and upon enquiry made, the Clerk informed the Court that the Coordinator of the Public Defenders' Program, Counsellor James C.R. Flomo had travelled out of Liberia by the approval of the Chief Justice while the Deputy Coordinator, Counsellor Elijah Cheapoo, now of sainted memory was seriously ill, and other counsellors working with the Public Defenders Program could not be contacted. Therefore, the Court having observed that both the State and the appellant had filed their respective briefs, ruled disallowing arguments and evoked Article IV, Part 6(b) of the Revised Rules of the Supreme Court which authorize the Court to enter upon the records and render a judgment with or without an opinion in the case. Thus, the present opinion.

We have determined that in order to dispose of this case, a thorough review and disposition of the issues raised in the 19 (nineteen) count bill of exceptions is necessary.

In counts 1 (one) through 4 (four) of the bill of exceptions, the appellant assigned as errors questions posed to the private prosecutrix which were overruled by the trial judge. The questions asked were to the number of times the private prosecutrix bled following the alleged rape and the number of persons living in the house in which both he and the private prosecutrix lived along with their parents. We fail to grasp the relevance of these questions or their link to the crime charged or what the appellant is attempting to prove by these lines of questioning. We have searched and have found no law or precedents set by this Court that the number of times a rape victim bleeds is *sine qua non* in determining the crime of rape, or that the private prosecutrix, a ten (10) year old must remember the number of persons living in the same house as she and her alleged assailant before the crime of rape can be established. We hold that given the fact that these questions do not correlate to the gravamen of the appellant's innocence or guilt, the trial judge committed no error in overruling these irrelevant questions posed by the appellant.

In counts 6 and 7 of the bill of exceptions, the appellant assigned as error, a question overruled during his cross examination of the investigator from the Liberia National Police, as to why statements obtained from residents were not included in the police charge sheet and, why the investigator did not produced any evidence from the crime scene to support the charge levied against the appellant or to conclude that indeed it was the appellant who committed the alleged crime of rape.

Firstly, pursuant to the Criminal Procedure Law Rev. Code 2:21.1, all criminal cases tried in our courts are governed by the rules of best evidence and burden of proof,

enounced in chapter 25 of the Civil Procedure Law. As provided for therein, no evidence is sufficient which supposes the existence of better and superior evidence; the best evidence which the case admits of must always be produced, with the caveat that the burden of proof rests on the party who alleges a fact and in criminal cases like the one now on appeal, it is the State which carries the burden of proof. *Civil Procedure Law*, Rev. Code 1:25.5; Id. 25.6; *Davies v. Republic*, 40 LLR 659 (2001); *Okrasi v. Republic*, Supreme Court Opinion, March Term, A. D. 2009; *Sirleaf v. Republic*, Supreme Court Opinion, March Term, A. D. 2012; *Bestman v Republic of Liberia*, Supreme Court Opinion, October Term, A. D. 2013.

In view of this, we would not be remiss in assuming that the police and the State in gathering evidence for the prosecution of this case must have decided which evidence were relevant to satisfactorily and sufficiently prove the guilt of the appellant. This Court has opined that, "it is not our prerogative to tell the State how to prosecute its cases." *Sirleaf v. Republic*, Supreme Court Opinion, March Term, A.D. 2012. Accordingly, we disagree with the appellant's argument that the State be compelled to produce additional evidence from the crime scene where the alleged rape occurred and we cannot by law muscle the State to include additional witnesses' statements in the police charge sheet. The Supreme Court has held as follow:

"a police report or charge sheet is supplementary evidence and that absent an official police report, other pieces of evidence such as eye witnesses' accounts, victims' testimonies and documentary evidence are sufficient grounds to establish probable cause." *Corneh v. Republic*, Supreme Court Opinion, March Term, A.D 2014.

In the present case, the State, in proving the charge of rape, exhibited not only the police report and charge sheet but also the private prosecutrix blood-stained clothes from the night of Friday, February 18, 2011, a medical report plus the testimonies of the private prosecutrix, her brother and her step-father to substantiate the fact that indeed the private prosecutrix was raped. If the appellant believed that those witnesses and the evidence that he claimed the State failed to produce and admit into evidence which could have operated in his favor, he owed himself the legal duty to have produced those witnesses to testify on his behalf and to admit those evidence in order to disprove the crime of rape as the State had done in proving his guilt by the evidence it chose to use.

Now, it should be noted that although the private prosecutrix did not report the rape until two days thereafter, which could not have allowed the State, the police investigator or the midwife to discover any spermatozoa on the victim or the appellant as both would have bathed; coupled with the fact that other persons could have contaminated the crime scene - the appellant's room - by frequent visitation to watch his television, all these will still not vitiate the fact that the crime of raped occurred and that this did not negate other circumstantial evidence introduced by the State. The Supreme Court has held that "it would be alarmingly dangerous for courts of law, in such a heinous crime as rape, which is amongst the lowest and most debased crimes one can be guilty of, to require evidence to convict the offender beyond the testimony of the woman (in this case a 10 year old child) ravished and such corroborating evidence as the circumstances surrounding the case permit of; and if from fear growing out of threats she fails to make an alarm, or to expose her assailant immediately, to a great extent the law will excuse her failure to do so..." *Massaquoi v. Republic*, Supreme Court Opinion, October Term, A.D. 2013; 1LLR 320,322 (1898).

Further, the Supreme Court in a plethora of Opinions has acknowledged and recognized the significance of circumstantial evidence in exposing crimes that are usually

committed in secrecy, holding that: *"people do not always commit offenses publicly in the open day, but often commit them in secret, or at night, and if circumstantial evidence were excluded, all secret offenses might be committed with impunity. Circumstantial or presumptive evidence therefore is allowed in all cases where direct and positive evidence of the prisoner's guilt cannot be procured; and it is often satisfactory as direct and positive evidence when it is so connected as to positively connect one element within another for a chain of evidence sufficient to lead a mind irresistibly to the conclusion that the accused is the guilty party."* *Ledlow et al., v. Republic, 2LLR 529(1925); Kpolleh et al., v. Republic 36 LLR 623, 669 (1990); Elizabeth Davies v. Republic, 40LLR, 659(2001); Massaquoi v. Republic, Supreme Court Opinion, October Term A.D. 2013; Gardea v. Republic, Supreme Court Opinion, March Term, A.D. 2014.*

In addition to the production of circumstantial evidence in this case, the State also produced direct evidence from the crime scene in person of the 10 year old private prosecutrix, whose testimony corroborated and confirmed the circumstantial and evidential documents adduced in this case. Her act of gallantry to confront her sexual assailant in the court of law and then recount her horrific and traumatic ordeal compels us to reminisce on the case *Massaquoi v. Republic*, Supreme Court Opinion, October Term, A.D. 2013 wherein a rape victim, a minor also of tender age, demonstrated similar courage. The facts in that case reveal that defendant Massaquoi raped the private prosecutrix who was 11 years old. The private prosecutrix narrated this heinous ordeal to her mother, the police, and the physician assistant who medically examined and treated the private prosecutrix. At trial, the private prosecutrix narrated her entire horrific experience with defendant Massaquoi. This testimony, which was not denied by the defendant, was further corroborated by the private prosecutrix mother, the police and the physician assistant. The jury, after listening to the evidence, convicted defendant Massaquoi and the trial court confirmed the verdict. Defendant Massaquoi in his bill of exceptions challenged the verdict and the judgment of the trial court on grounds that the testimony of the prosecution, except for that of the private prosecutrix, was hearsay.

On appeal the Supreme Court rejected defendant Massaquoi's argument on grounds that he failed and neglected to deny or rebut the testimony of the private prosecutrix, who herself took the stand, albeit she had narrated her story to her mother and the physician assistance. Moreover, this Court asked the questioned as to what motive an 11 year old child would have to move her to lie on the defendant, and concluded that none was found. This is how the Supreme Court addressed the testimony of the private prosecutrix, an eleven (11) year old minor:

"to determine the trustworthiness, reliability and admission of statements made by child victims of abuse, courts should consider the following factors, to wit:

1. *the child's age and maturity,*
2. *the nature and duration of the abuse,*
3. *the relationship of the child to the offender,*
4. *the coherence of the statement, bearing in mind that young children may sometimes describe incidents in age-appropriate language and in a disorganized manner,*
5. *The child's capacity to observe, retain, and communicate information,*
6. *The nature and character of the statement itself, considering the child's developmental limitations in understanding and describing sexual behavior,*
7. *Any motivation of the child to make false allegation or a false denial,*

8. *The child's susceptibility to suggestion and the integrity of the situation under which the statement was obtained, and*
9. *All the circumstances under which the statement was made."*

All of the above obtains in this case. The private prosecutrix was of the tender age of 10 years old; she lived in the same house with the appellant; she was very coherent in her testimony and demonstrated astute retentive memory by vividly describing each ordeal that occurred on the night of that February 18, 2011; she recalled her brother being prevented from re-entering the room of the appellant and the manner in which the appellant silenced her; in child like language she described her vagina as "tata" and the appellant's penis as "toto" and the sexual act as, "he did rude rude thing to me"; also given these circumstances and the fact that her integrity is unquestioned the testimony of the private prosecutrix is accepted as authentic and true. Further, it corroborates and confirms the allegations in the police charge sheet and the medical report.

In light of all that we have stated, we hold that the trial judge committed no error in overruling the appellant's question regarding the inclusion of additional witnesses' statements in the police charge sheet; neither did she err in overruling questions regarding the submission of additional evidence from the crime scene.

In counts 8 (eight) and 9 (nine) of the bill of exceptions the appellant assigned as error the provision of the medical report where it was stated that no bruises, cuts or scars were seen on the vulva of the private prosecutrix, implying that in the absence of these injuries, rape could not have occurred and, thus, he could not be charged and convicted for the crime of rape.

We restate the relevant provisions of our Penal Law regarding rape as follows:

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

(a)(i) He intentionally penetrates the vagina, anus, mouth 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 with any other part of the body (other than the 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 Statute further provides as follow:

(a) Sexual Intercourse

(i) Penetration, however slight, of the vagina, anus or mouth, or any other opening of another person by the penis; or

(ii) Penetration, however slight, of the vagina, or anus of another person by a foreign object or any other part of the body (other than the penis).

The provisions of our rape statute cited *supra*, is clear, unambiguous and precise as to what constitutes rape. It is stated: **"penetration however slight; where the victim is less than 18 (eighteen) years old and the actor is eighteen years or older; and when the victim was subjected to fear by the use of violence at the time**

of the act..." (emphasis added). Nowhere in the above provisions of the statute is it stated that scars, cuts, lacerations or other injuries must be present or visible on the vagina or vulva of the victim to establish the crime of rape. This Court says that while such factors or appearances could further strengthen the State's case, yet to accept and adopt the appellant's contention that it is necessary that such factors be present when it is not required by law will be a gross deviation from the clear language of the statute and we so hold.

In counts 10 (ten) through 13 (thirteen) of the bill exceptions, the appellant stated that he was not present on the date and time of the alleged rape. As stated earlier in this Opinion the appellant testified that on the night of February 18, 2011, he was at a video-club on the 72nd Boulevard watching a football game since he was not in possession of his generator which he claimed he had rented out to his friend, Mr. Adama Kanneh. The records show that although the appellant claimed he is a sport-lover and that he was watching a football game at a video-club on the 72nd Boulevard, he could neither remember the name of the team that played on the night of February 18, 2011, nor could he remember the name of the video-club or state the exact location of the said video-club. For better appreciation of this Court's conclusion on this issue we have decided to re-state the appellant's answers to questions from the jury on this point:

"Q: Mr. Witness, you said on Wednesday night you were in the video-club watching Arsenal v. Barcelona, which video-club was it?"

A: I am a sport lover. On Wednesday night, Real TV showed the games. So I did not leave my house to go to the video club. But after I had given my generator, it was Friday I went to the video-club to watch the game.

Q: Mr. Witness I want to know the name of the video-club on SKD Boulavard?"

A: There is a video club right around the drugstore but I can't remember the team name, [but] it was there I watched football game."

The above responses by the appellant are clear indications of his gross failure to prove his alibi. Additionally, the records reveal that he did not produce a single witness from his community to corroborate and confirm his testimony that he rented his generator to Mr. Adama Kanneh prior to February 18, 2011, or to confirm that he was indeed present at a video-club on the night of February 18, 2011, watching a football game. In fact, the appellant's lone witness, Mr. Adama Kanneh, to whom he claimed to have rented his generator, accorded no support to the appellant's alibi. In fact, he distanced himself from the appellant by offering testimonies that did not concur with the appellant's alibi; his testimony, both under direct and cross examinations made it crystal clear that he was not a close friend of the appellant and that although he rented the appellant's generator he could not remember the exact date and month he rented the generator. In summary, Witness Kanneh's testimony did not corroborate the appellant's testimony or confirm the appellant's alibi.

We should further inject that it was only two (2) days following the day of the alleged crime that the appellant was arrested by the police. Certainly, all the details as to where he was, what games or movies he had watch and where he had watched them would still have remained explicit in his mind; and knowing the gravity of the offense with which he had been charged, it is hard to believe that the appellant would have forgotten any of the facts regarding the events of that day rather, those facts would have remained retentive in his memory such that he would be in the position to convince the jury and the court of the genuineness of the alibi he intended to put forth.

An alibi, according to the Supreme Court, "is an effective defense in a criminal case, because of its character of proving the physical impossibility of a person being in more than one place at the same time. It is the physical circumstance which derives its potency as a defense of the fact that it involves the physical impossibility of the guilt of the accused. From this standpoint, an alibi is not only a legitimate defense but may be a very complete defense. It affords, if established, the most perfect, physically conclusive evidence of the defendant's innocence; **but if during a proceeding it can be shown that an alibi was manufactured, and was untrue, it will nullify the favorable effect of the alibi of the accused.**" *Yancy v. Republic of Liberia*, 27 LLR 365 (1978); *Saar v Republic of Liberia*, 29 LLR 35 (1981); *Ben v. Republic of Liberia*, 31 LLR 107, (1983); *Fartoma v RL, Supreme Court Opinion, October Term, A. D. 2010*; *Corneh et al. v RL, Supreme Court Opinion, October Term, A. D. 2014*.

We hold that the appellant's failure to prove his alibi in the face of the State incriminating evidence placing him at the scene and the time of the rape, said failure nullifies, dissolves and abolishes all presumptions of innocence in his favor and establishes a strong inference of his guilt for commission of the heinous crime of rape.

In counts 14 (fourteen) and 15 (fifteen) of the bill of exceptions, the appellant assigned as error the failure of the trial judge to instruct the jury on what he referred to as the three types of verdicts, *viz* hung verdict(jury), unanimous verdict or guilty verdict. The appellant alleged that the failure of the trial judge to properly instruct the jury culminated into the jury returning a unanimous verdict of guilty against him.

The Criminal Procedure Law Rev. Code 2:20.7 provides that "*at the time of instructing the jury, the judge may sum up the evidence and instruct the jury that they are to determine the weight of the evidence and the credit to be given to the witnesses.*"

The Criminal Procedure Law also stipulates:

1. "*Prior to retirement of the jury. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court shall instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury, but the court shall instruct the jury after arguments are completed. The court shall instruct the jury on every issue of law arising out of the facts even though no requests to charge thereon have been submitted by counsel. The court shall instruct the jury in writing if requested and may give its instructions in writing on its own motion. **No party may assign as error all or any portion of the charge or any omission therefrom unless he excepts thereto before the jury retires to consider its verdict. [Our Emphasis]***
2. "*After retirement of the jury. The jury may at any time during deliberations ask the court for instructions on any point, and the court shall, if the request is proper, give the jury such instructions.*"

As stated earlier both the State and the appellant filed legal memorandum wherein they requested the trial court to charge the jury on points of law controlling the verdict. The appellant specifically requested the trial court to charge the jury on the following points of law:

- 1) Burden of proof
- 2) Best evidence
- 3) Relevance of evidence
- 4) Corroboration
- 5) Presumption of innocence of the defendant
- 6) Rebuttal

Nowhere in the appellant's legal memorandum did he request the trial court to instruct or charge the jury on his profess 'three of types of verdict'. As a matter fact, the records reveal that based upon the appellant's request, quoted *supra*, the trial judge charged the jury on the points of law submitted in his legal memorandum and that of the State. Had the appellant desired the jury to be further instructed, the *onus* was upon him to include such request in his legal memorandum or following the trial judge's charge and in consonance with the provision of the statute quoted *supra*, to have excepted to said charge on points which he had requested but which the judge may have omitted in his charge, before the jury retired for its deliberation. We hold therefore, that the judge's charge, which incorporated all points of law from both parties, was in consonance with the law. Hence, no error was committed.

In counts 16 through 18 of the bill of exceptions, the appellant assigned as error the trial judge's denial for a new trial and that the verdict was not in conformity with the evidence. Given the fact that we have already held that the appellant's failure to prove his alibi is a strong inference of guilt, we find it unnecessary and redundant to discuss these contentions. However, as surplusage will not vitiate all that we have stated herein, we briefly restate pertinent facts of this case that is, on February 18, 2011, the appellant, a notorious criminal by his own confession forcefully inserted his fingers and penis into the vagina of the ten (10) year old private prosecutrix; had sexual intercourse with her against her consent and prevented her brother from re-entering the room during the commission of his devious and nefarious act. The corroborating testimonies of the State's witnesses *viz*, the private prosecutrix father, her brother, the police officer and the certified midwife all proved that the crime of rape was committed.

The Supreme Court has held that: "the credibility of a witness and the weight and value to be given to his testimony in a criminal prosecution is a matter to be determined by the jury or by the court if it sits without a jury; that where the verdict is pillared and firmly supported by the evidence in the records, same will not be disturbed by a motion for new trial and the Supreme Court will confirm the jury's verdict that is in conformity with the law and evidence." *Ezzat Eid v Republic*, 37 LLR 775, 776 (1995); *Living Counsellor v Republic*, Supreme Court Opinion October Term 2008; *Harris v. Cavalla Rubber Corp.* Supreme Court Opinion October Term 2012. We affirm these principles of law and hold that the verdict being supported by the evidence and the law the trial judge committed no error in denying the motion for new trial.

In count 19 (nineteen) of the bill of exceptions the appellant assigned as error he being sentenced to 10 (ten) years imprisonment without the trial court providing any legal justifications as to whether his sentencing is *ultra vires*, excessive, arbitrary, or against any constitutional or statutory laws.

The grading and sentencing provision of our Statute on Rape provides thus:

"Grading and Sentencing

(a) Rape is a felony of the first degree where

- (i) The victim was less than 18 years of age at the time the offense was committed; or;*
- (ii) The offense involves gang rape or*
- (iii) The act of rape complained of result in either permanent disability or serious bodily injury to the victim or*
- (iv) At the time of the relevant act or immediately before it began the defendant threatened the victim with firearm or other deadly weapon.*

(b) The maximum sentence for first-degree rape shall be life imprisonment, and for the purposes of bail it shall be treated as per capital offenses under section 13.1.1; Capital offenses of the Criminal Procedure Law.

(c) Rape is a second-degree felony where the conditions set out in section 4(a) (i)-(iv) above are not met. The maximum sentence for second-degree rape shall be ten (10) years imprisonment."

In view of the above quoted provision, we agree with the appellant that the trial judge did err when he sentenced him to ten (10) years imprisonment, albeit, our agreement stems from a different perspective.

The facts and supporting species of evidence adduced during the trial of this case, and which have been extensively discussed in this opinion, support the guilty verdict of the crime of rape. However, the trial judge erred by failing to take judicial cognizance of the penalty prescribed by the law as stated *supra*. The private prosecutrix in this case, being less than 18 years of age, in fact being only 10 years old at the time of the commission of the act and the defendant being 20 years old at the time the crime was committed, the crime fell within the realm of a first degree felony, for which the statute imposes a maximum sentence of life imprisonment. The term of imprisonment for a second degree felony being 10 years, it was error for the trial judge to have imposed a 10 years sentence. By the law quoted, the sentence for a first degree felony for rape ought to be higher than that of a second degree felony. For this error, and this Court having the authority to enter the proper judgment that the lower court should have entered and in consonance with the requisite provision of the Penal Law, hereby holds that the sentence of ten (10) years imprisonment is modified and a sentence of 20 years imprisonment imposed, commencing as of the first date of appellant's imprisonment, with a possibility of parole after 11 years of imprisonment.

WHEREFORE AND IN VIEW OF THE FOREGOING, the judgment of the trial court which confirmed the jury's unanimous verdict of guilty against the defendant is hereby affirmed but with the modification to the term of imprisonment as stated herein above.

The Clerk of this Court is hereby ordered to send a mandate to the court below to resume jurisdiction over this case and give effect to this Opinion. IT IS SO ORDERED.