IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 131 OF 2019**

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

JABESS MVULA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: **Chashi, Mulongoti and Lengalenga, JJA**

ON: **21st May, 27th August and 14th October, 2020**

For the Appellant: **I. Yambwa, Legal Aid Counsel, Legal Aid Board**

For the Respondent: **S. C. Kachaka (Mrs.), Senior State Advocate, National Prosecutions Authority**

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. **Emmanuel Phiri v The People (1982) ZR,287**
2. **Bernard Chisha v The People (1980) ZR, 36**
3. **Alubisho v The People (1976) ZR, 11**

4. **Ivess Mukonde v The People - SCZ Judgment No. 11 of 2011**
5. **Nsofu v The People (1973) ZR, 287**
6. **Patrick Hara v The People - SCZ Appeal No. 162 of 2011**
7. **Abel Musonda v The People - CAZ Appeal No. 41 of 2019**
8. **Saul Banda v The People - CAZ Appeal No. 117 of 2017**
9. **Daniel Banda v The People - CAZ Appeal No. 137 of 2018**
10. **Joseph Mulenga, Albert Joseph Phiri v The People (2008) ZR, 1 Vol 2**
11. **Jutronich, Schutte, Lukin v The People (1965) ZR,11**
12. **Gideon Hammond Millard v The People - SCZ Judgment No. 10 of 1998**
13. **Modester Kalaba v The People - CAZ Appeal No. 86 of 2017**

Legislation referred to:

1. **The Penal Code, Chapter 87 of the Laws of Zambia.**
2. **The Juveniles Act, Chapter 53 of the Laws of Zambia.**

1.0 INTRODUCTION

1.1 This appeal emanates from the Judgment of the Subordinate Court of the First Class (S. Magalashi), delivered on 28th March 2018. By that Judgment, the

Appellant was convicted on three counts of defilement contrary to section 138(1) of ***The Penal Code***[1] as read with Act No. 15 of 2005 and Act No. 2 of 2011.

1.2 Upon committal to the High Court for sentence, before Hon. Mr. Justice Isaac Kamwendo, the Appellant was sentenced to fifty (50) years imprisonment with hard labour on each count to run concurrently with effect from 17th August, 2018.

2.0 CHARGE BEFORE THE TRIAL COURT

2.1 The Appellant was charged with three counts of defilement contrary to Section 138(1) of ***The Penal Code***[1] as read with Act No. 15 of 2005 and Act No. 2 of 2011. The Particulars of the offence alleged that the Appellant on 4th August, 2018, at Chisamba in the Chisamba District of the Central Province of the Republic of Zambia, had unlawful carnal knowledge of Naomi Himalumba, Mable Himalumba and Tendai Nyati. (The 1st,2nd and 3rd Prosecutrixes).

2.2 The Appellant denied all three counts, prompting a trial in which the prosecution called a total of six (6) witnesses while the Appellant was the sole witness for the defence.

3.0 EVIDENCE BEFORE THE TRIAL COURT

3.1 We wish to state from the outset that the three victims, in the present case, who were of tender years underwent a **voire dire** and the trial court, rightly so, found that they possessed sufficient intelligence to justify the reception of their evidence on oath and understood the duty of speaking the truth.

3.2 We also note that, at the time of taking plea, the statutory defence was explained to the Appellant.

3.3 The facts underlying the conviction were briefly as follows; PW1, the mother to the 1st and 2nd Prosecutrixes and also the wife to the Appellant, left home on Friday 3rd August, 2018 to attend a funeral in Ndayilala, leaving the children, including the 3rd Prosecutrix, under the care, control and custody of their step-father, the Appellant.

3.4 On the material day, the 1st and 2nd Prosecutrix went to bed around 20:00 hrs. The Appellant then followed the children to the living room where they were sleeping and undressed the 1st Prosecutrix and defiled her. The next morning, while the 1st Prosecutrix was sweeping, the Appellant had carnal knowledge of the 2nd Prosecutrixes. Afraid of being defiled again, the victims went to PW4's house, their aunt's house and narrated to her what had transpired.

3.5 PW4 was further informed that the Appellant also had carnal knowledge of her daughter, the 3rd Prosecutrix. There was also evidence that the Appellant had carnal knowledge of the 2nd and 3rd Prosecutrixes on more than one occasion. PW4 reported the matter to the village headwoman who checked the children and confirmed that they had been defiled. When PW1 returned from the funeral, on 6th August, 2018, she was informed of what transpired while she was away.

3.6 The Appellant was subsequently, apprehended by members of the community and brought before the

village headwoman. When asked about the incidence, the Appellant apologised saying **"forgive me I did not know what had come over me."**

3.7 PW1 reported the matter to Chipembi Police Station, where she was issued with three medical reports. Thereafter, the victims were taken to Kabwe General Hospital, where they were examined. The findings as set out in the medical report revealed that the 1st and 2nd Prosecutrixes hymens were broken and the 3rd Prosecutrix, had redness on the introitus of the vagina, with hymen intact. The findings were consistent with the alleged offence of defilement. The Appellant was subsequently charged and arrested for the subject offence.

3.8 The Appellant's evidence was in tandem with that of the prosecution. He confirmed that the children were left in his care and that on the material date, he was home alone with the 1st and 2nd Prosecutrixes. However, he denied having defiled the three victims and alleged that PW4, his sister in law, bore a grudge against him and

that he overheard her telling the children to falsely implicate him in the offence.

3.9 He further alleged that when he was apprehended by members of the community, he was beaten and brought before the headwoman. When asked about the incident, he denied but was threatened that if he did not admit to the offence, they would take the issue far and things would not end well for him. He was further asked to pay one or two animals for defiling the children and because he feared being arrested or beaten, he agreed to give them animals.

3.10 In cross examination, the Appellant admitted that on the material date, the victims spent a night in his house and that he was the only male person present. He further stated that, he did not confront PW4, when he heard her telling the children to falsely implicate him in the offence and that he only agreed to having defiled the victims because he was beaten.

4.0 FINDINGS OF THE TRIAL COURT

4.1 Faced with the foregoing evidence, the trial court found as a fact that the age of the children had been proved. With regard to the 1st Prosecutrix, the trial court relied on the evidence of PW1, who testified to the effect that the child was aged 13 years. The trial court also relied on its ocular observation. Regarding the 2nd and 3rd Prosecutrixes, the trial court relied on the under five cards tendered into evidence by the prosecution.

4.2 On the commission of the offence, the trial court relied on the medical reports, as corroborating the evidence of the victims that they had been defiled. The learned Magistrate further relied on the evidence of PW1 and PW4 who recalled their daughters complaining about pain on their private parts.

4.3 As to the identity of the assailant, the learned Magistrate found that, there was corroborative evidence of opportunity, as the Appellant had access to the victims from 3rd August to 5th August 2018. Further that the Appellant admitted that he was the only male person in the house when the said incidences occurred.

4.4 The trial court also considered the behaviour of the victims after the incidence, in that, they were afraid of going back home to the Appellant and insisted on staying with PW4. Further that, the Appellant's behavior, on 5th August 2018 after he overheard PW4 and the children discussing the issue of him defiling the children. The Appellant did not confront PW4 but instead decided to return home and keep quiet about it, until he was apprehended by members of the community.

4.5 Lastly, the trial court found corroboration in the evidence of PW1, PW4 and the Appellant himself to the effect that he admitted asking for forgiveness from the headwoman and some members of the public. And, that he defiled the victims and offered his animals as compensation.

4.6 Flowing from her reasoning, the learned trial Magistrate found that the prosecution had established all the ingredients of the offence of defilement in all counts and convicted him accordingly. The Appellant now appeals against conviction and sentence.

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with the decision of the lower court, the Appellant has appealed to this Court advancing two grounds of appeal couched as follows;

1. **The learned trial court erred in law and fact when it convicted the Appellant on uncorroborated evidence.**
2. **The learned trial court erred in law and fact when it sentenced the Appellant to fifty (50) years despite being a first offender.**

6.0 ARGUMENTS IN SUPPORT OF APPEAL

6.1 Mr. Yambwa, Counsel for the Appellant, filed in the heads of argument dated 6th April 2020, upon which he entirely relied.

6.2 In support of ground one, Counsel submitted that the evidence against the Appellant was uncorroborated. Counsel relied on the case of **Emmanuel Phiri v The People**[1], for the position that cases involving sexual offences require corroboration of the commission of the offence and the identity of the offender.

6.3 According to Counsel, in the instant case, there was no corroboration as to the commission of the offence and as

to the identity of the offender, in order to eliminate the dangers of false complaint and false implication.

6.4 We were further referred to the case of **Bernard Chisha v The People**[2] for the position that evidence of a child of tender years requires to be corroborated and in the instant case, there was no corroborative evidence to support the evidence of the victims, that, it is the Appellant that committed the offence.

6.5 Ground two was argued in the alternative, Counsel for the Appellant impugned the decision of the learned Judge in sentencing the Appellant to fifty (50) years imprisonment despite the fact that he was a first offender. He argued that such a sentence should come to us with a sense of shock, as it does not reflect the leniency accorded to a first offender. Our attention was drawn to the case of **Alubisho v The People**[3], where the Supreme Court gave guidelines on when an appellate court can interfere with a sentence.

7.0 ARGUMENTS OPPOSING THE APPEAL

7.1 Mrs. Kachaka, Counsel for the State, equally filed in heads of argument dated 7th April, 2020, upon which she relied.

7.2 In response to ground one, the Appellant agreed with the principle espoused in the case of **Emmanuel Phiri v The People**[1], referred to by the Appellant, to the effect that in sexual cases, there is need for corroboration, both as to the commission of the offence and the identity of the offender in order to eliminate the dangers of false implication and false complaint. Counsel further argued that corroboration in cases involving evidence of a child was a statutory requirement as provided for in section 122(1) of **The Juveniles Act**[2]**.**

7.3 According to Counsel, in the instant case, there was sufficient corroboration to support the conviction. With regard to the commission of the offence, Counsel submitted that there was corroboration in the evidence of the three victims who testified on oath to the effect that the Appellant had defiled them. Further that, the medical reports supported their testimony that they had been

defiled. Counsel relied on the case of **Ives Mukonde v The People**[3]

7.4 Counsel further submitted that, the Appellant had the opportunity to commit the offence, as he remained with the victims at home and that he was the only male person with the victims in the house at night, which evidence was not disputed. According to Counsel, this ruled out the possibility of the victims being defiled by someone else. Counsel referred us to the case of **Nsofu v The People**[5] and submitted that the locality of the opportunity, in the present case, was enough to amount to corroboration.

7.5 According to Counsel, there was further corroborative evidence in the behaviour of the children after the incidence, when they refused to go back to the Appellant's house and insisted on staying with PW4. In addition, that the evidence of PW1 and PW4 who recalled having noticed the 2nd and 3rd Prosecutrixes complaining of pain on their private parts, confirmed their testimony

that the offence was committed and that it was the Appellant who defiled them.

7.6 Lastly, that the victims knew the Appellant very well as he was their stepfather and he admitted that he kept the victims and remained with them overnight. According to the Appellant, this satisfied the identification of the Appellant as the perpetrator of the offence. Reliance was placed on **Ives Mukonde v The People[4].**

7.7 In response to ground two, Counsel relied on the case of **Alubisho v The People[3]**, cited by the Appellant and submitted that the lower court has the discretion with the exception of prescribed minimum and mandatory sentences to select a sentence that seems appropriate in the circumstances of each individual case.

7.8 According to Counsel, the circumstances prevailing in the present case, were that the Appellant defiled three children of tender ages. He took advantage of the children and breached their trust instead of providing the protection they needed in the absence of their mothers.

7.9 Counsel further referred us to the cases of **Patrick Hara v The People**[6] and to our decision in the case of **Abel Musonda v The People**[7] and submitted that the Appellant in the present case was a married man aged 39 years and a step father to the victims. It was submitted that considering the circumstances of the case, the sentence meted out by the learned Judge was appropriate and should not come with a sense of shock.

8.0 DECISION OF THE COURT

8.1 We have considered the evidence on record, the respective submissions of learned Counsel and the impugned Judgment. With respect to ground one, the issue for determination is whether there was sufficient corroborative evidence to connect the Appellant to the offence.

8.2 On the commission of the offence, the medical reports produced by the prosecution confirmed the evidence of the victims that they were defiled. The reports reveal that the hymen was broken in relation to the 1st and 2nd

Prosecutrixes and that the 3rd Prosecutrix sustained injuries with hymen intact.

8.3 As to the identity of the offender, we note that the trial court in arriving at its decision that the Appellant had been positively identified as the offender, relied, *inter alia* on the evidence of opportunity, in that, the Appellant had access to the victims from 3rd August to 5th August 2018 and that he admitted that he was the only male person in the house when the said incidences occurred. We further note that, Counsel for the Respondent equally relied on the evidence of opportunity in the heads of argument.

8.4 There are a *plethora* of authorities on the evidence of opportunity such as **Saul Banda v The People**[8], **Daniel Banda v The People**[9] and **Nsofu v The People**[5] which clearly states that mere opportunity alone does not amount to corroboration but that there must be something out of the ordinary so as to raise suspicion. In the circumstances of this case, the Appellant being the only male person in his house and having access to the children did not raise any suspicion as to amount to

corroboration. There is nothing suspicious or out of the ordinary about a father being left alone in the same house with his children. The circumstances and the locality of the opportunity, in the present case, do not amount to corroboration.

8.5 However, having considered the other circumstances of the case, which the trial court also considered, we are of the view that there is still evidence on record to corroborate the identity of the Appellant as the offender. Firstly, the fact that the Appellant did not challenge the evidence of PW4, when she testified to the effect that, when the Appellant was apprehended and brought before the village headwoman, he apologised, claiming that he did not know what had come over him. This was a material piece of evidence that implicated the Appellant as the offender, and it went unchallenged. In the case of **Joseph Mulenga, Albert Joseph Phiri v The People**[10], the Supreme Court stated that-

> *"When prosecution witnesses are narrating actual occurrences, the accused persons must challenge those*

facts that are disputed. Leaving assertions which are incriminating to go unchallenged diminishes the efficacy of any ground of appeal based on those very assertions which were not challenged during trial."

8.6 Secondly, the Appellant testified that when he went to PW4's house, he overheard her telling the victims to falsely implicate him and that she would buy them sweets. The Appellant stated that, he did not confront PW4 but went back to his house. In our view, the conduct of the Appellant of not confronting PW4 was inconsistent with that of an innocent person. As we see it, any person faced with such a situation, would immediately have confronted PW4 to exonerate himself of the said allegation of committing such a heinous crime.

8.7 In our view, the behaviour of the Appellant is consistent with that of a guilty person and as such, confirms that the Appellant committed the offence. In addition, the Appellant admitted that he had defiled the victims and that he could offer his animals as compensation. We note that the Appellant, alleged that he only admitted to

having committed the offence because he was beaten, however, when considered with the other evidence, the Appellant's explanation was not plausible. It was an afterthought and a mere scam.

8.8 Based on the above pieces of evidence, we are satisfied that there was sufficient corroborative evidence as to the identity of the Appellant. Therefore, the only irresistible inference is that the Appellant was the person who defiled the children. We find no merit in ground one of the appeal.

8.9 Coming to ground two, Counsel for the Appellant argues that the Appellant being a first offender, deserves the leniency of the court. According to Counsel, the sentence of fifty (50) years does not reflect the leniency accorded to a first offender. Conversely, the Respondent argues that considering the prevailing circumstances of the case, the sentence meted out by the learned Judge was appropriate.

8.10 It is important to set out the circumstances under which an appellate Court can interfere with sentence. The

general approach of an appellate court in sentencing was properly set out in the case of **Jutronich, Schutte and Lukin v The People**[11] as follows:

> *"In dealing with appeals against sentence the appellate court should ask itself these three questions:*
>
> *(1) Is the sentence wrong in principle?*
>
> *(2) Is the sentence so manifestly excessive as to induce state of shock?*
>
> *(3) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?*
>
> *only if one or other of these questions can be answered in the affirmative should the appellate court interfere."*

8.11 Further, in the case of **Gideon Hammond Millard v The People**[12], the Supreme Court held as follows:

> *"An appellate court should not lightly interfere with the discretion of the trial court on question of sentence but that for the appellate court to decide to interfere with the sentence, it must come to it with a sense of shock."*

8.12 In light of the holding in the above cited authorities, it is very clear that sentence is a matter that rests in the

discretion of the sentencing court and an appellate court does not enjoy **carte blanche** to interfere with sentences which have been properly meted out by the sentencing court, unless it can be shown that the sentencing court has acted upon a wrong principle, overlooked relevant material or taken into account irrelevant factors or that the sentence is manifestly excessive.

8.13 The question, therefore, is whether the sentence of fifty (50) years in the circumstances of the present case, comes to us with a sense of shock? In determining this issue, we will consider the circumstances surrounding the present case.

8.14 The Appellant on the material date, defiled three children aged 13, 8 and 4 years old. These were children left in his custody by PW1, his wife and PW4, his sister in law who were attending a funeral. His wife trusted the Appellant to look after the children but instead, the Appellant abused the trust reposed in him as a parent and he took advantage of the children. In our view, therefore, the Appellant's moral blameworthiness is heightened by the

breach of the trust and the age of the victims, which we consider to be aggravating factors and have taken the case out of the realm of an "ordinary" defilement. In our recent case of **Modester Kalaba v The People**[13], we had the opportunity to discuss aggravating factors in defilement cases and we held as follows:

> *"It is now settled law that the tender age of the prosecutrix, in a sexual offence, can be an aggravating factor. It is also settled that the aggravation increases as the age of the prosecutrix reduces. In this case, the prosecutrix was 14 years old at the time the offence was committed. Since an offence is only committed when the prosecutrix is below 16 years, we find that the fact that the prosecutrix was 14 years old, at the material time cannot be an aggravating factor. The case can even be classified as a "borderline case". Consequently, we find that the age of the prosecutrix in this case was not an aggravating factor.*
>
> *However, we agree with Mrs. Phiri that the fact that the appellant defiled a child he was left to take care of was an aggravating factor. This is because he breached the*

trust that was placed in him to look after the children. The other aggravating factor is that the abuse left the prosecutrix pregnant; She was only 14 years at the time. This being the case, we find that this case cannot be classified as being an "ordinary" case of defilement because there are aggravating factors."

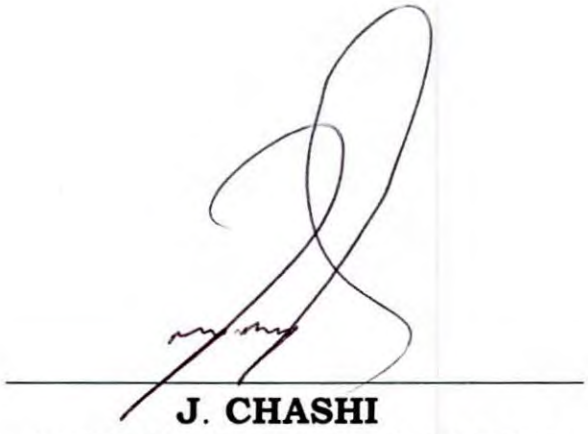
8.15 Given the aggravating factors in the present case, these being the age of the victims, the relationship that existed between the Appellant and the victims and considering that this offence carries a maximum sentence of life imprisonment, the sentence of fifty (50) years imprisonment is not excessive and does not come to us with a sense of shock.

8.16 The sentence meted out by the learned Judge was correct in principle and we accordingly decline to interfere with it. For the above reasons, this ground of appeal fails.

9.0 CONCLUSION

9.1 All in all, we find that the offence was proved to the requisite threshold of proof beyond reasonable doubt

against the Appellant. We find no merit in the appeal and the same is dismissed in its entirety.



J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE