

file.

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL 063/2020

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

BOYD SANKOPE

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Chishimba, Ngulube JJA,

13<sup>th</sup> October, 2020 and 23<sup>rd</sup> October, 2020.

For the Appellant: H.M. Mweemba- Principal Legal Aid Counsel, Legal Aid Board

For the Respondent: G. Zimba- Deputy Chief State Advocate National Prosecutions Authority

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## J U D G M E N T

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Mchenga, DJP, delivered the Judgment of the Court.

Cases referred to;

1. Joseph Mulenga and Albert Joseph Phiri v The People  
SCZ Judgment No. 28 of 2008
2. Mwewa Murono v The People [2004] Z.R. 207
3. Emmanuel Phiri v The People [1982] Z.R. 71

4. Benard Chisha v The People [1980] Z.R. 36
5. Senseta v The People [1976] Z.R. 184
6. Chabala v The People [1975] Z.R. 98
7. Saluwema v The People [1965] Z.R.4
8. Kambenja v The People SCZ Appeal Number 157 of 2009
9. Emmanuel Phiri v The People [1982] Z.R. 71
10. Machipisha Kombe v The People [2009] Z.R. 282
11. Nsofu v The People [1973] Z.R. 287
12. Ives Mukonde v The People SCZ Judgment No. 11 of  
2011
13. Jutronich and others v The People [1965] Z.R. 9

**Legislation referred to;**

1. The Penal Code, Chapter 87 of the Laws of Zambia.

**1. Background**

- 1.1 The appellant, initially appeared before the Subordinate Court (Hon. Mukela), sitting in Livingstone on a charge containing one count of the offence of defilement of a child contrary to **section 138(1) of the Penal Code.**

- 1.2** The allegation was that on an unknown date, but between 7<sup>th</sup> October and 8<sup>th</sup> of October 2018, at Livingstone, the appellant had unlawful carnal knowledge of a girl below the age of sixteen years old.
- 1.3** At the conclusion of those proceedings, the appellant was convicted and committed to the High Court for sentencing.
- 1.4** In the High Court (Maka-Phiri, J.), sentenced the appellant to 25 years imprisonment, with hard labour.
- 1.5** He has now appealed against the conviction and sentence.

## **2. Evidence before the trial court**

- 2.1** On 7<sup>th</sup> October 2018, in the late afternoon, the prosecutrix was heading home, after visiting a friend in Livingstone's Dambwa Site and Service compound, when the appellant, who was her sister's boyfriend, offered her a lift in a taxi that he was driving. She accepted the offer.

- 2.2** However, instead of taking her home as promised, the appellant took her to a bush near Nakatindi School, where he had sexual intercourse with her in the car. Later that night he was to have sexual intercourse with her, in the car, in two different places.
- 2.3** It was only in the early hours of the 8<sup>th</sup> of October 2018, around 05:00, hours that he took her home. Her left her at the gate after knocking. He then drove off.
- 2.4** Her elder sister, Gift Mulenga, the appellant's girlfriend, confirmed that the prosecutrix returned home in the early hours of the 8<sup>th</sup> of October 2018. After the prosecutrix narrated what had transpired, she phoned their mother, Viviane Phiri, who was out of town and informed her of what had transpired.
- 2.5** However, when she came to testify in court, as a defence witness, Gift Mulenga denied being told by

the prosecutrix, that her boyfriend had sexual intercourse with her that night.

**2.6** When the prosecutrix's mother returned, on 9<sup>th</sup> October 2018, the matter was reported to the police. They were issued with a medical report form and the prosecutrix was examined the same day. The doctor's finding was that she had been defiled.

**2.7** During the trial, the prosecutrix mother gave evidence that her daughter was born on 21<sup>st</sup> March 2005. She also produced an under-five clinic card in support of her testimony.

**2.8** In his defence, the appellant gave evidence and called two witnesses.

**2.9** He admitted having brought the prosecutrix in the morning, but said it was on the 5<sup>th</sup> of October 2018 and not the 8<sup>th</sup> of October 2018. He also told the trial magistrate that that on 4<sup>th</sup> October 2018, between 22:00 hours and 23:00 hours, he met the prosecutrix in Dambwa Site and Service, where he had taken customers.

**2.10** He offered to take her home but she was reluctant.

He said he drove around with her while carrying a client. He took her home after he had concluded his busy business schedule.

**2.11** Joyce Mwale, told the trial magistrate that on 4<sup>th</sup> October 2018, around 23:30 hours, she hired appellant's taxi to take her to the police station and the hospital, after she had been attacked. In the taxi, she found the prosecutrix, who did not show any signs of discomfort or exhaustion. They were there with her until at about 05:10 hours on 5<sup>th</sup> October, 2018.

### **3. Findings by trial magistrate**

**3.1** The trial magistrate found that it was common cause that sometime in October 2018, the appellant gave the prosecutrix a lift in a taxi that he was driving. He then spent the entire night with her and left her at the door of her home, the following day around 05:30 hours.

- 3.2** She also found that prosecutrix told her mother that the appellant had defiled her and the matter was reported to the police. Thereafter, it was established at Livingstone Central Hospital that she had been defiled.
- 3.3** The trial magistrate accepted the evidence from the prosecutrix mother on the date of her birth and found that she was 13 years old, at the time the offence was committed.
- 3.4** She rejected the appellant's alibi upon taking the view that it was an afterthought. She also found Joyce Mwale's evidence as not being credible and decided not to rely on it.
- 3.5** Finally, the trial magistrate found that the prosecutrix evidence that the appellant defiled her was corroborated by the appellant's admission that was with her the whole night. She found that he had the opportunity to commit the offence.

#### **4. Grounds of appeal and arguments by counsel**

**4.1** The sole ground of appeal is that the charge of defilement was not proved beyond reasonable doubt.

**4.2** Mr. Mweemba submitted that all the essential ingredients of the offence of defilement were not proved beyond reasonable doubt. He pointed out that the benchmarks set in the cases of **Joseph Mulenga and Albert Joseph Phiri v The People<sup>1</sup>**, **Mwewa Murono v The People<sup>2</sup>** and **Emmanuel Phiri v The People<sup>3</sup>**, for proving cases, were not met and that being the case, the appellant should have been acquitted.

**4.3** He also referred to the cases of **Benard Chisha v The People<sup>4</sup>** and **Senseta v The People<sup>5</sup>** and submitted that the possibility of the prosecutrix falsely implicating the appellant, after she was rebuked for staying out late, cannot be ruled out in this case.

**4.4** Finally, Mr Mweemba submitted that the appellant's explanation of why he was with the prosecutrix the

whole night, was reasonable and it should have been accepted. It raised doubts in the prosecution's case that warranted an acquittal. He referred to the cases of **Chabala v The People**<sup>6</sup> and **Saluwema v The People**<sup>7</sup>, in support of the proposition.

4.5 Mr. Zimba's response was that the charge against the appellant was proved beyond reasonable doubt. The prosecutrix testimony that he committed the offence was corroborated by evidence that the appellant had an opportunity to commit the offence. He referred to the cases of **Kambenja v The People**<sup>8</sup>, **Emmanuel Phiri v The People**<sup>9</sup> and **Machipisha Kombe v The People**<sup>10</sup>, in support of his position.

## 5. Consideration matters and decision of this court

5.1 The offence of defilement of a child is set out in section **138(1) of the Penal Code**. The relevant part of the provision, read as follows:

"Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not

less than fifteen years and may be liable to imprisonment for life; and

Provided that it shall be a defence for a person charged with an offence under this section to show that the person had reasonable cause to believe, and did in fact believe, that the child against whom the offence was committed was of, or above, the age of sixteen."

- 5.2 The main ingredients of the of the offence of defilement can be said to be two, sexual intercourse (1) with a girl below the age of 16 years (2)
- 5.3 In this case, there was evidence that the prosecutrix was below the age of 16 years from her mother. Her testimony was uncontested.
- 5.4 Similarly, there is overwhelming evidence that the prosecutrix had sexual intercourse. What was disputed was who she had sexual intercourse with.
- 5.5 The trial magistrate accepted the prosecutrix evidence that she had sexual intercourse with the appellant. It being a sexual offence, her evidence requires corroboration. There was no

eye witness, but the sister and a customer confirmed that the appellant was with her the whole night and he did not deny it.

5.6 In the case of **Nsofu v The People**<sup>11</sup> in which the Supreme Court pronounced as follows;

"Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of the particular case. In *Credland v Knowler* [2] Lord Goddard, CJ, at page 55 quoted with approval the following dictum of Lord Dunedin in *Dawson v Mackenzie* [3]:

"Mere opportunity alone does not amount to corroboration, but . . . the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration."

5.7 Furthermore, on the aspect of when an opportunity to commit an offence can be corroborative, the Supreme Court, in the case of **Ives Mukonde v The People**<sup>12</sup>, held that;

"Whether evidence of opportunity is sufficient to amount to corroboration must depend upon all the circumstances of a particular case. The circumstances, and the locality of the

**opportunity may, be such that in themselves amount to corroboration.**

- 5.8** From the record it cannot be disputed that the age of the prosecutrix and the commission of the offence were proved beyond reasonable doubt. In relation to the identity of the offender, it is apparent that on 7<sup>th</sup> and 8<sup>th</sup> October 2018, between 19:00 hours and 05:30 hours, the appellant was with the prosecutrix. The appellant in fact admitted that he was with her the whole night because he became busy and was unable to take her home.
- 5.9** It is our considered view that the trial Magistrate cannot be faulted for rejecting his explanation and arriving at the conclusion that he had an opportunity to commit the offence. A consideration of all the circumstances surrounding this case reveals that the evidence of opportunity in this case corroborated the identity of the appellant as the perpetrator in this case.
- 5.10** It is our considered view that the character of opportunity in this case raised an element of

suspicion. We find that this is not an appropriate case in which an appellate court can assail the findings of fact of the trial court. We therefore, find that the trial court was on firm ground when she convicted the appellant in this case.

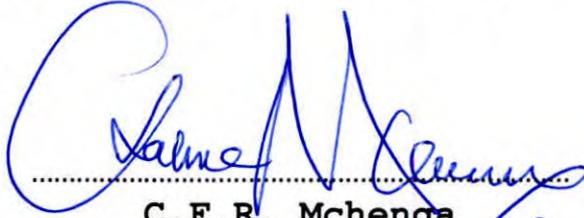
**5.11** With regard to the sentence we have noted that the trial court noted that the appellant was a first offender and thus he deserved the leniency of the court. She however, took into consideration that the appellant defiled the prosecutrix three times and found that that in itself, amounted to an aggravating factor.

**5.12** We have also note that the conduct of the appellant in this case amounted to an abduction of Gift Phiri because he her took away from home against her will and that of her mother or guardian at the time. We are of the view that the sentence imposed by the High Court has not come to us with a sense of shock for being manifestly unjust,

excessive or wrong in principle as guided in the case of **Jutronich and others v The People**<sup>13</sup>.

**5. Verdict**

**5.1** The sole ground of appeal having been unsuccessful; the appeal is dismissed. We uphold the conviction and sentence imposed by the courts below.

  
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**C.F.R. Mchenga**  
**DEPUTY JUDGE PRESIDENT**

  
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**F.M. Chishimba**  
**COURT OF APPEAL JUDGE**

  
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**P.C.M. Ngulube**  
**COURT OF APPEAL JUDGE**