

file

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL 065/2020

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

CHRIS CHISENGELE

APPELLANT

AND

THE PEOPLE

RESPONDENT



CORAM: Mchenga DJP, Chishimba, Ngulube JJA,

13th October, 2020 and 23rd October, 2020.

For the Appellant: B. Banda, Legal Aid Counsel, Legal Aid Board

For the Respondent: C. Bako, Deputy Chief State Advocate National
Prosecutions Authority

J U D G M E N T

Mchenga, DJP, delivered the Judgment of the Court.

Cases referred to:

1. Mangalashi Kapwepwe v The People CAZ Appeal No. 59/2018
2. Chileya v The People [1981] Z.R. 33
3. Banda (K) v The People [1977] Z.R. 169
4. Lubinda v The People [1973] Z.R. 43
5. Ndalama v The People [1976] Z.R. 220
6. Nsofu v The People [1973] Z.R. 287

7. Katebe v The People [1975] Z.R. 13
8. Nzala v The People [1976] Z.R. 221
9. Emmanuel Phiri v The People [1982] Z.R. 77
10. Zulu v The People [1973] Z.R. 326

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. Background

1.1 The appellant, was tried before the Subordinate Court sitting at Livingstone (Hon. Simaanya), on a charge of defilement of a child, contrary to **section 138(1) of the Penal Code**. At the end of that trial, he was convicted and committed to the High Court for sentencing.

1.2 In the High Court (Maka-Phiri, J), sitting at Mazabuka, sentenced the appellant to 30 years imprisonment, with hard labour.

1.3 He has now appealed against his conviction

2. Evidence before the trial court

2.1 The evidence before the trial magistrate was that on 4th June 2017, at about midday, the appellant

met a young girl aged 15 years old, at a shop in Mbaale Village, in the Chivuna area of Mazabuka district. He offered to pay her K100 if she agreed to go with him to his hut to have sex. She agreed.

2.2 He went with the girl to his hut where he had sexual intercourse with her but he did not pay her. In addition, he detained the girl for four days and had sexual intercourse with her on each of those days.

2.3 In the meantime, the girl's uncle, who was looking for her, was informed by the appellant's neighbours, that they had seen a young girl at the appellant's house. The girl's uncle communicated this information to members of the neighbourhood watch committee who planned to raid the appellant's house in the night.

2.4 However, as it turned out, the girl fled before the raid and was reunited with her parents. The appellant was apprehended and handed over to the police.

2.5 While the girl and her uncle testified, the neighbours who had seen the girl at the appellant's house did not. The uncle also produced an "under five card" to support his testimony that she was 15 years old at the time the offence was committed.

2.6 In his defence, the appellant denied having ever detained the girl or having had sexual intercourse with her. He also raised an alibi, testifying that he was at a church function during the period he is alleged to have committed the offence.

3. Findings of trial magistrate

3.1 The trial magistrate accepted the girl's evidence that the appellant detained her for 4 days and had sexual intercourse with her, on each of those days. He also accepted her uncle's evidence, that she was only 15 years old at the material time.

3.2 Further, he recognised the need for corroborative evidence, as a matter of practice, defilement being a sexual offence. He found that the girl's testimony was corroborated by the neighbours who told the girl's father, that they had seen a young

girl, at the appellants house. He also found that the girl and her uncle had no reason to lie or falsely implicate the appellant.

4. Grounds of Appeal and arguments by counsel

4.1 Though five grounds have been advanced in support of this appeal, their scrutiny establishes that they raise 3 issues. These are:

4.1.1 the mishandling of the appellant's alibi;

4.1.2 the prosecutrix age not being proved; and

4.1.3 the failure of the court to satisfy itself that the appellant had understood the alibi

4.2 Mr. Banda referred to the cases of **Mangalashi Kapwepwe v The People¹**, **Chileya v The People²**, **Banda (K) v The People³** and **Lubinda v The People⁴** and submitted that there was dereliction of duty when the police failed to investigate his alibi that he was at a church conference at the time he is alleged to have committed the offence.

4.3 He also argued that the trial magistrate erred in law when he found that the appellant had not proved his alibi beyond all reasonable doubt.

- 4.4 As regards proof of the girl's age, Mr. Banda argued that it was not proved. To prove the age, the prosecution relied on an 'under-5 card' that was not credible because it had alterations.
- 4.5 Coming to the explanation of the proviso, Mr. Banda argued that since the appellant was not represented, the trial magistrate should have gone further than just explaining it. He should have satisfied himself that he understood the 'meaning, effect and ramifications' of the proviso.
- 4.6 We were urged to allow the appeal and set aside the conviction.
- 4.7 In response, Mr. Bako pointed out that the issue that this appeal raises is one of corroboration. Since the appellant was charged with a sexual offence, the prosecutrix evidence required corroboration, but it was not.

5. Consideration of issues by court and its decision

- 5.1 The first issue we will deal with is the explanation of the proviso to the appellant. The law has long been settled; that where an accused

person is unrepresented, the proviso must be explained; see the cases of **Ndalama v The People**⁵ and **Nsofu v The People**⁶.

5.2 The purpose of explaining the proviso is to make it clear that the defence is available to an accused person. In our view, the court's duty ends there and we have no doubt that explained in plain language as the courts have always done, there should be no difficulties. We do not agree with Mr. Banda's proposition that the court should go further and satisfy itself that he appreciates the implications. What happens when the court finds that he doesn't?

5.3 We are satisfied that the practice as it stands now is sufficient and that there was no need for the trial magistrate to satisfy himself that the appellant understood the implications of the proviso.

5.4 As regards the handling of proviso, we agree with Mr. Banda that there was misdirection when the trial magistrate found that the appellant had

failed to prove it beyond all reasonable doubt. In the case of **Katebe v The People**⁷, it was pointed out that where a defence of alibi is set up and there is some evidence of such an alibi, it is for the prosecution to negative it. There is no onus on an accused person to prove his alibi. It was therefore wrong for the court to find that the appellant had failed to prove the alibi beyond all reasonable doubt.

5.5 Notwithstanding the erroneous ruling on the burden of proof in the alibi, we find that the appellant was not prejudiced in any way. The alibi was only raised in court, during the appellant's defence. In the case of **Nzala v The People**⁸, it was held, inter alia, that:

'Where an accused person on apprehension or on arrest puts forward an alibi and gives the police detailed information as to the witnesses who could support that alibi, it is the duty of the police to investigate it.'

5.6 In this case, dereliction of duty does not arise because the alibi was only raised in court, during the appellant's defence. Properly directing

herself, the trial magistrate could have dismissed the alibi as an afterthought.

5.7 We will now deal with proof of the girl's age. We have examined the card and note that there are alterations. We are unable to tell the significance of the alterations, particularly that they don't relate to the date of birth but other issues. Further, the card was received into evidence without objection. The issues Mr Banda raises now, should have been raised during the trial

5.8 As we indicated earlier on, Mr. Bako's response to this appeal was on the question of corroboration. The trial magistrate found that the girl's evidence was corroborated by her uncle's testimony that neighbours told him that they had seen a young girl at the appellant's house.

5.9 What the girl's uncle told the court, about a girl being seen at the appellant's house, was hearsay and inadmissible because none of the neighbours were called to give evidence in court. That being

the case, Mr. Bako was correct when he pointed out that the girl's testimony was not corroborated.

5.10 However, in the case of **Emmanuel Phiri v The People**⁹, the Supreme Court held as follows:

(i) In a sexual offence there must be corroboration of both commission of the offence and the identity of the offender in order to eliminate the dangers of false complaint and false implication. Failure by the court to warn itself is a misdirection.

(ii) A conviction may be upheld in a proper case notwithstanding that no warning as to corroboration has been given if there in fact exists in the case corroboration or that something more as excludes the dangers referred to.

(iii) It is a special and compelling ground, or that something more which would justify a conviction on uncorroborated evidence, where, in the particular circumstances of the case there can be no motive for a prosecutrix deliberately and dishonestly to make a false allegation against, an accused;

5.11 In this case, the trial magistrate found that there was no reason why the girl could have falsely implicated the appellant. Having examined the record of appeal we are satisfied that he was entitled to come to that conclusion. Since the girl

was above the age of 14 years, her testimony did require not corroboration as a matter of law, as provided for by **section 122 of the Juveniles Act.**; also see **Zulu v The People**¹⁰.

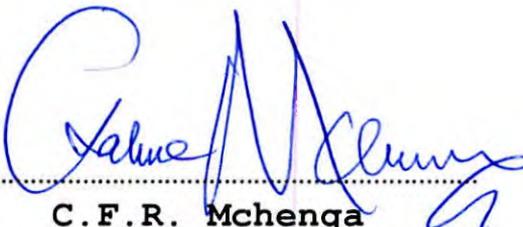
5.12 It is our view that even if the girl's evidence was not corroborated, properly directing himself on the law, the trial magistrate would have found that there were special and compelling grounds, having found that there was no reason why the girl would have falsely implicated the appellant. Such a finding would have allowed him to convict the appellant on the girls uncorroborated evidence as to the identity of the appellant.

6. Verdict

6.1 Although we found in favour of the appellant's argument that the trial magistrate erred when he found that the appellant had not proved the alibi, we pointed out that there was no dereliction of duty when it was not investigated as it was only raised in court during the appellant's defence.

6.2 We also found that the girls age was proved and that there was no need for the magistrate to have satisfied himself that the appellant had understood and appreciated the effect of the proviso.

6.3 That being the case, we find that the appeal, in the main fails and has no merit. We uphold the conviction and sentence imposed on him, by the lower courts.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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


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