IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO.87/2020**
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

PETER HAMANDO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: ***MULONGOTI, NGULUBE AND SIAVWAPA, JJA.***

On 19th January and 31st March 2021

FOR THE APPELLANT: *MR. H. MWEEMBA, PRINCIPAL LEGAL AID COUNSEL*

FOR THE RESPONDENT: *MS. C. SOKO, DEPUTY CHIEF STATE ADVOCATE*

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Alubisho v The People (1976) ZR 13*
2. *Mathews Chitupila Chalwe v The People Appeal No. 58/2020*
3. *Jutronich, Schuttee and Lukin v The People (1965) ZR 11*
4. *Phiri v The People 1970 SJZ 189*
5. *Benua v the People (1976) ZR 17 (SC)*
6. *Patrick Hara v the People SCZ Appeal No. 162/2011*

Legislation referred to:

1. *Penal Code Chapter 87 of the Laws of Zambia as amended by Act No. 15 of 2005 and Act No. 2 of 2011.*

1.0. **INTRODUCTION**

1.1. The Appellant was convicted of one count of defilement contrary to Section 138 (1) of the Penal Code Chapter 87 of the Laws of Zambia as amended by Act No. 15 of 2005 and Act No. 2 of 2011.

1.2. The conviction followed his plea of guilt and admission of facts for which he was sentenced to thirty (30) years imprisonment with hard labour by the High Court.

1.3. In passing sentence, Mr. Justice I. Kamwendo considered the fact that the Appellant was a first offender who had pleaded guilty. He however, took the view that the prosecutrix's life had been endangered by the resulting pregnancy and considered a thirty (30) year sentence as appropriate.

2.0. **APPEAL**

2.1. The Appellant was dissatisfied with the thirty-year term of imprisonment which he considered to be at variance with the established law on sentencing for first offenders who plead guilty.

2.2. The appeal is therefore against sentence only anchored on one ground set out as follows;

"The learned trial Judge misdirected himself in law and in fact when he sentenced the Appellant to 30 years imprisonment, in light of him being a first offender who had readily pleaded guilty".

3.0. **ARGUMENTS**

3.1. At the hearing of the appeal Mr. Mweemba, on behalf of the Appellant, placed full reliance on the filed Heads of Argument.

3.2. The arguments placed before us are that the thirty year term of imprisonment should come to us with a sense of shock in line with the case *of Alubisho v The People (1976) ZR 11*[1].

3.3. It was further argued that the facts of the case did not disclose any aggravating circumstances on a twelve year old girl. In that regard we were referred to our decision in *Mathews Chitupila Chalwe v the People*[2] in which we stated that pregnancy was a consequence of sexual intercourse and that it should not be taken to be an aggravating circumstance.

3.4. Referring to the case of *Jutronich, Schutte and Lukin v The People*[3] in which the following considerations were set out in appeals against sentence namely;

(a) Whether the sentence is wrong in principle

(b) *Whether the sentence is so manifestly excessive as to induce a state or sense of shock and*

(c) *Whether there are exceptional circumstances which would render it as an injustice if the sentence was not reduced,*

Counsel submitted that the sentence was so manifestly excessive as the Appellant was a first offender who had pleaded guilty.

3.5. In her viva voce response, Ms. Soko, for the Respondent submitted that in the case of *Mathews Chalwe v the People (supra)* relied upon by the Appellant, it was a case of incest procured by threats.

3.6. She urged us to distinguish the two as the appeal before us involved a twelve year old child defiled by a thirty-six year old man by reason of which her tender age and the resulting pregnancy constituted aggravation.

4.0. **OUR VIEWS AND DECISION**

4.1. The only question for our resolution is whether a sentence of thirty years comes to us with a sense of shock given the circumstances of the case.

4.2. We are alive to the principle that where the law prescribes a minimum mandatory sentence, a first offender who pleads guilty ought to be given the minimum mandatory sentence

unless there are aggravating circumstances. A first offender and one who pleads guilty should be treated with leniency in appropriate cases, see the cases of *Phiri v The People*[4] *and Benua v the People*[5].

4.3. So in order for us to tamper with a sentence, we must satisfy ourselves that the same was wrong in principle or so lenient or excessive in the circumstances of the case that it comes to us with a sense of shock.

4.4. In this case, the victim was aged twelve years. She was ambushed in the night, sexually abused by a 36 year old and later found to be pregnant.

4.5. The above stated facts are, in our view, serious enough to take the case above an ordinary defilement. The sentencing Judge had the latitude to consider a sentence above the minimum mandatory of 15 years prescribed by statute.

4.6. We are fortified in our view by the Supreme Court decision in the case of *Patrick Hara v the People*[6].

4.7. In that case, the victim of defilement was aged twelve years. The Appellant sneaked into the house where the victim was and forcibly had carnal knowledge of her after which he warned her not to tell anybody.

4.8. He was charged under Section 138(1) of the Penal Code. He pleaded guilty and was sentenced to thirty years imprisonment with hard labour.

4.9. He appealed against sentence arguing that the sentence was colossal in the absence of aggravating circumstances and failure to take into account mitigating circumstances.

4.10. In dismissing the appeal, the Supreme Court rejected the Appellant's argument that the thirty-year sentence should be reduced to the statutory minimum of fifteen years on account that he was a first offender.

4.11. The Court further opined that the fact that the Appellant had attacked a twelve-year old girl in the house, covered her mouth and defiled her was unfortunate as young girls were no longer safe in their homes.

5.0. **CONCLUSION**

5.1. The facts in the appeal before us are closely identical with those in the Hara case hereinbefore referred to. The victims were both aged twelve years, the Appellants attacked and covered the mouths of their victims with clothes to prevent screaming and warned them not to tell anyone.

5.2. We however, find one major difference in the two cases which is that while no pregnancy resulted in the Hara case, the victim in this appeal fell pregnant.

5.3. We therefore, find it easy to reject, the Appellant's argument that the thirty-year sentence should come to us with a sense of shock in a case where the victim was found to be pregnant when in the Hara case, where there was no pregnancy the Supreme Court dismissed the appeal.

5.4. We accordingly find no merit in the appeal and dismiss it accordingly.

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J. Z. MULONGOTI
COURT OF APPEAL JUDGE

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P. C. M. NGULUBE
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE