IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 153/2021
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

BETWEEN:

WITIKA SILUPUMBWE **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Sharpe-Phiri and Muzenga JJA
On 15th June, 2022 and 9th December, 2022

For the Appellant: Ms M. Marabesa – Legal Aid Counsel, Legal Aid Board
Mr. S. M. Lungwebungu – Messrs SCPM Legal Practitioners

For the Respondent: Mr. K. Sifali – State Advocate, National Prosecution Authority

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J U D G M E N T

MUZENGA JA, delivered the Judgment of the Court.

Cases referred to:

1. **Emmanuel Phiri v The People (1982) ZR 77 (SC)**
2. **Bernard Chisha v The People (1980) ZR 36(SC)**
3. **Christopher Nonde Lushinga v The People – Supreme Court Judgment No. 15 of 2011**
4. **Ives Mukonde v The People (2011) ZR 134 Vol 2**
5. **Fumbelo v The People – Supreme Court Appeal No. 476 of 2013**

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 The appellant was charged with one count of defilement contrary to **Section 138 of the Penal Code**[1]. The particulars of the offence alleged that on the dates unknown but between December 2020 and 4th April 2021, in Kafue District, the appellant had unlawful carnal knowledge of Mary Makungu, a child below the age of 16 years. The appellant was subsequently convicted and sentenced to 15 years imprisonment with hard labour (Before Mr. Justice M.D. Bowa).

2.0 EVIDENCE IN THE COURT BELOW

2.1 The appellant's conviction was secured by the evidence of four prosecution witnesses. The first witness (PW1) was the 14 year old prosecutrix. After the trial court conducted a *voire dire,* PW1 testified that the appellant proposed to her sometime in 2020 and that she accepted the proposal. She narrated to the court that on several occasions she had sexual intercourse with the appellant and that at

two instances the appellant's friend Stanley was in the same house with them.

2.2 She told the told the trial court that she spent nights at the appellant's house and when she went back to her home, her father chased her. She eventually joined her grandmother in Kabwe who later came to inform her father that she was pregnant. She was taken to the police and later to the hospital where she was examined and later took the examination report to the police.

2.3 In cross examination, the prosecutrix stated that she was in a relationship with the appellant.

2.4 Stanley Nyarenda testified as PW2 and his testimony was to the effect that in December 2020, he was drinking beer at the market in the company of his friends. At around 22:00 hours, they bought takeaways and went to continue drinking from home. At 23:00 hours, he heard a knock and opened the door where he saw the appellant and the prosecutrix. They continued drinking and PW2 later slept. He told the trial court that when he woke up the following day he found the appellant and the prosecutrix sleeping and everyone else had left. He left for work with the two and around 23:00 to 24:00 hours, the

appellant came back with the prosecutrix and they all slept on the same bed. He stated that he was too tired to hear anything. He denied having sex with the prosecutrix.

2.5 Francis Makungu, the father to the prosecutrix testified as PW3 and his evidence was to effect that in December 2020, when his daughter went home around 23:00 hours, he chased her and asked her to go back where she had come from. She later informed him that she had slept at her friend's place. He told the trial court that she slept out for three days. She subsequently left for the Copperbelt with her grandmother and in January 2021 he was told that his daughter was pregnant. He asked that she be brought back after which he went to the appellant's parents to inform them what had happened. The following day he went to the police where he was given a form which he took to the hospital.

2.6 He told the trial court that his daughter was 14 years old and he produced an under-five card to prove her age.

2.7 The fourth prosecution witness was Lovemore Jere a police officer under the Kafue Victim Support Unit. His testimony was to the effect that he received a report from Francis Makungu of House No. 22/23

Shikoswe that his daughter Mary Makungu aged 14 years was defiled by an unknown person and she was 4 months pregnant. He told the trial court that when he received the medical report, he proceeded to interview the prosecutrix who told her that she had been defiled by the appellant. PW4 told the trial court that he further interviewed PW2 who accepted knowing the prosecutrix and the appellant and confirmed that the two were sleeping on the same bed but could not tell what was happening.

2.8 He further stated that he interviewed the appellant who accepted that the prosecutrix used to be his girlfriend and that they used to have sexual intercourse and that he knew of the pregnancy. PW4 further told the trial court that he later made up his mind and charged the appellant with the subject offence.

2.9 This marked the close of the prosecution case, after which the appellant was found with a case to answer and placed on his defence. He opted to give evidence on oath and called no witnesses.

3.0 DEFENCE

3.1 In his defence, the 22-year-old appellant told the trial court that on two occasions, he shared a bed with the prosecutrix and his friend

PW2. He denied having had carnal knowledge of the prosecutrix and applied for a DNA Test to be made at University Teaching Hospital.

3.2 In cross-examination, the appellant accepted that the prosecutrix was his friend, and she did visit him, however, he denied having had sex with her.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The trial court considered the evidence on record and found that the age of the child had been established through the documents on the record and that offence committed had been proved as the prosecutrix was pregnant. The court further found that the appellant was positively identified by the prosecutrix and that her evidence was corroborated by the evidence of PW2. In conclusion, the trial court found that the prosecution had proved the case beyond all reasonable doubt. The appellant was accordingly convicted of the subject offence and was later sentenced to 15 years imprisonment with hard labour.

5.0 GROUND OF APPEAL

5.1 Discontented with the conviction and sentence, the appellant filed one ground of appeal couched as follows:

(1) The lower court erred in law and in fact when it convicted the appellant without corroboration with regards to the identity of the appellant.

6.0 APPELLANT'S ARGUMENTS

6.1 In support of the sole ground of appeal, it was submitted that in sexual offences it is cardinal that there be corroboration on the identity of the offender and the commission of the offence. It was counsel's contention that the appellant's identification in this matter was not corroborated. In support of this argument, we were referred to the case of **Emmanuel Phiri v The People[1]** where it was held that:

> **"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 danger of false complaint and false implication. Failure by the court to warn itself is misdirection."**

6.2 It was submitted that the prosecutrix is a child of tender age making her evidence unreliable without corroboration. We were referred to the case of **Bernard Chisha v The People[2].** It was submitted that the prosecutrix is a child who could be affected by imagination due to the immaturity of the mind or indeed could have been influenced by adults.

6.3 It was submitted that the prosecutrix testified that she was defiled on more than one occasion by the appellant on a small mattress where the three of them slept with PW2. While on the other hand PW2 insisted that he never heard or saw the appellant defile the prosecutrix. Counsel contended that this created doubt if indeed the prosecutrix was defiled by the appellant. According to the appellant, the state did not discharge its duty to prove the case beyond all reasonable doubt.

7.0 RESPONDENT'S ARGUMENTS

7.1 In responding to the sole ground of appeal, counsel for the respondent contended that the court below was on firm ground when it convicted the appellant and subsequently sentenced him to 15 years imprisonment with hard labour.

7.2 It was contended further that the trial court properly analyzed the facts before it and found corroborative evidence. We were referred to the case of **Christopher Nonde Lushinga v The People**[3] where the Supreme Court held *inter-alia* that:

> **"There is no magical meaning in the word "corroboration." It simply means evidence which confirms the commission of the offence and the identity of the perpetrator of that offence. Put differently, corroboration means supporting or confirming evidence."**

7.3 It was contended that apart from the evidence of PW1 and PW2, the fact that the appellant spent nights with the victim in the same bed in PW2's house, afforded him the opportunity to defile the child. Counsel pointed out that opportunity has been widely recognized by the courts to be corroborative evidence. In support of this argument, we were referred to the case of **Ives Mukonde v The People**[4] where the Supreme Court held that:

> **"Whether evidence of opportunity is sufficient to amount to corroboration must depend on all the circumstances of a particular case. The circumstances and the opportunity may be such that in themselves amount to corroboration."**

7.4 It was submitted that corroborative evidence is evidence that tends to support a proposition that is already supported by some initial evidence. It was argued that the evidence of PW2 corroborated the evidence of the prosecutrix that the prosecutrix had spent several nights with the appellant at his house, where they had shared a bed, facts which the appellant does not deny. It was pointed out that during his examination in chief the appellant stated that he had left the prosecutrix with PW2 on many occasions but during cross-examination, no questions were put to PW2 over the same. We were referred to

the case of **Fumbelo v The People**[5] where the Supreme Court guided that:

> **"In the case of a witness who is an accused person, it is indeed very important that he must examine witnesses whose testimony contradicts his version on a particular issue. When an accused raises his version for the first time only during his defence, it raises a very strong presumption that the version is an afterthought and, therefore, less weight will be attached on such version. Therefore in a contest of credibility against other witnesses, the accused is likely to be disbelieved."**

7.5 It was contended that there is nothing in the circumstances of this case from which it can be inferred that PW2 falsely implicated the appellant.

7.6 In summation, it was contended that there is corroboration on the record regarding the commission of the offence as well as the identity of the appellant. We were urged to dismiss the appeal for want of merit.

8.0 THE HEARING

8.1 At the hearing, learned counsel for the parties relied on their respective filed arguments. We are grateful for their arguments.

9.0 DECISION OF THE COURT

9.1 We have carefully considered the evidence on the record, the arguments by the parties and the judgment sought to be assailed.

9.2 The issue in this appeal is whether there was corroboration as to the identity of the offender.

9.3 We wish to note on the onset that the learned trial court conducted a *voire dire* before receiving the evidence of the prosecutrix. According to her testimony on her own age and the father's evidence, she was fourteen years old. This means that according to **The Juveniles Act,** now repealed, there was no need to conduct a *voire dire* as this is only applicable to witnesses below the age of fourteen. The *voire dire* was thus of no legal effect.

9.4 We also wish to note that during PW4's evidence, he informed the trial court that the appellant admitted the offence at the time of arrest. The trial court then proceeded to enquire from the appellant, who responded that **"I never admitted the charge."** The trial court then proceeded to conduct a trial-within-a-trial.

9.5 We wish to guide trial courts that a trial-within-a-trial can only be conducted where the issue of voluntariness of a confession is raised by the accused or counsel. Where an accused person denies making the statement, there is no need to conduct a trial-within-a-trial. The issue becomes one of credibility which must be resolved by the trial court

like any other issue at the end of the trial in the judgment. This lapse by the trial court is inconsequential as it had no bearing on the lower court's decision, neither does it have any bearing in our decision.

9.6 There is no dispute that the appellant spent two nights on the same bed with the prosecutrix in the presence of PW2. Admittedly, PW2 did not hear or see the two having sexual intercourse. It is only the evidence of the prosecutrix to the effect that the appellant had sexual intercourse with her on those two occasions and the fact that she subsequently discovered she was pregnant.

9.7 We have already stated that the prosecutrix was fourteen years old. Therefore, the corroboration required is not as a matter of law. A conviction can thus be sound where evidence of something more or what may be termed as special and compelling grounds exist.

9.8 In this case, the appellant admitted having spent two nights with the prosecutrix, during which she alleged that he defiled her leading to her pregnancy. We wish to note that although a paternity test was not conducted, this case is one of defilement in which paternity may not be relevant. This is because one may not be the father of the child but may have had sexual intercourse with the prosecutrix.

9.9 The circumstances of this case clearly shows that the appellant had opportunity to commit the offence. This is clearly not mere opportunity but it is one which is suspicious and leads to an inescapable conclusion that the appellant had sexual intercourse with the prosecutrix. This amounts to corroboration or indeed provides the **"something more"** on which a conviction may be anchored.

9.10 We cannot thus fault the finding of the court below that there was corroboration.

10.0 CONCLUSION

10.1 We find no merit in the sole ground of appeal and we accordingly dismiss it. The conviction and sentence by the lower court is upheld.

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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT

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N. A. SHARPE-PHIRI
COURT OF APPEAL JUDGE

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K. MUZENGA
COURT OF APPEAL JUDGE