IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 12/2022
HOLDEN AT NDOLA
(Criminal Jurisdiction)

BETWEEN:

MWILULA SICHIPAMBA **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Mchenga DJP, Sichinga and Muzenga JJA
On 23rd August, 2022 and 15th December, 2022

For the Appellant: Mrs. S. C. Lukwesa – Acting Chief Legal Aid Counsel, Legal Aid Board

For the Respondent: Mr. S. Simwaka – Senior 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. **David Phiri v The People (1977) ZR 151**
2. **Macheka Phiri v The People (1973) ZR 145**
3. **Elias Phiri v The People – Appeal No. 44 of 2017**
4. **Gideon Hammond Millard v The People – Supreme Court Judgment No. 10 of 1998**
5. **Try Hamenda v The People – Appeal No. 8 of 2018**
6. **Jutronich, Schutte and Lukin v The People (1965) ZR 9**

Legislation referred to:

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

1.0 INTRODUCTION

1.1 The appellant was charged with the offence of defilement contrary to **section 138(1) of the Penal Code[1] as amended by the Penal Code (Amendment) Act No. 15 of 2005.** The particulars of the offence are that the appellant on 10th March 2018 at Choma in Southern Province of Zambia had unlawful carnal knowledge of the prosecutrix a girl under the age of sixteen years. The appellant was subsequently convicted and sentenced to 35 years imprisonment with hard labour. (Before Mr. Justice C. Zulu).

2.0 EVIDENCE IN THE COURT BELOW

2.1 The appellant's conviction was secured by the evidence of ten prosecution witnesses. The first witness was the prosecutrix and she told the trial court that on her way from school with her friend Chrispin Muchindu they met the appellant who asked them why they were moving at night and threatened to take them to the head teacher. As they were going to the head teacher, the appellant asked them to

choose between being beaten and being taken to the head teacher. She narrated that Chrispin chose to be taken to the head teacher and that is how the appellant let him go. The appellant then detained PW1 and later, with threats led her to the shops and eventually behind the shops near a dip tank and had carnal knowledge of her.

2.2 She went on to testify that after this, they met the guard and she cried for help. The security guard advised the appellant to let go of her but the appellant threatened to beat the guard. It was her continued testimony that the appellant then dragged her saying he was taking her to the head teacher. They went past the head teacher's house and ended up at the appellant's house. While there the appellant had carnal knowledge of her and around 05:00 hours, he let her go. She told the trial court that the appellant followed her behind until she reached near her home.

2.3 When she reached home, she narrated her ordeal to her friends Florine and Levina. Her friends advised against her informing her grandmother as she would blame them. With the help of Chrispin, she was later taken to the clinic where she was examined and given pills. She stated that her grandmother and parents were later informed.

2.4 The appellant was eventually captured and examined at the hospital where he was found to be HIV positive. They went to Choma General Hospital and later they went to Choma Central Police Station. At the hospital, she underwent more tests, and the doctor signed the form from the police which her parents took back to the police station. She later identified the appellant in court and stated that she was born on 10th July 2002.

2.5 Chrispin Muchindu a grade 12 pupil at Siachitema Mission School testified as PW2. His testimony was similar to that of PW1. Noris Masongozi, the watchman at the Agro shop testified as PW3. He narrated that he saw the appellant with the prosecutrix and PW2 as he threatened to report them to the head teacher. He testified that he tried to stop him but the appellant insisted that he was only doing his job. It was his testimony that later, the appellant returned with the prosecutrix who was pleading with him to let her go but the appellant refused. He narrated that when he saw the two, they were coming from the shops and the prosecutrix looked scared and unhappy. He told the trial court that he knew the appellant from 2005.

2.6 Under cross examination he stated that the prosecutrix looked sad but was not crying.

2.7 Nora Nyemu the mother to the prosecutrix testified as PW4. In her evidence, she told the trial court that her daughter was born on 10th July, 2002 and that she was 14 years old. She tendered into evidence the prosecutrix's under-five card.

2.8 PW5, James Sianzala, the father to the prosecutrix narrated how he apprehended the appellant and took him to the clinic. He added that when he apprehended him, the appellant apologized for his actions. He told the trial court that the appellant was known to him as they lived in the same area.

2.9 Levina Siazikata, a grade nine pupil, and a classmate to the prosecutrix testified as PW6. She told the court that on the fateful day, they went for evening preparation studies and when they knocked off around 21:00 hours, they left as a group but she arrived home alone. She stated that the prosecutrix arrived home the following morning. She told the trial court that the prosecutrix told Florine and herself that she spent a night with the appellant who had carnal knowledge of her by force.

2.10 She narrated that soon after the prosecutrix told them about her ordeal, they escorted her to the clinic and later they informed her parents. PW6 identified the appellant in court.

2.11 PW7, Sunday Chisenga, a grade 12 pupil at Siachitema Mission School, narrated that Levin phoned him to go to her place with Chrispin. He went there with Chrispin and together they took the prosecutrix to the clinic.

2.12 Peter Banda a male Nurse at Siachitema Mission Clinic testified as PW8. He told the trial court that he attended to the prosecutrix when she was brought to the he clinic. It was his testimony that when he examined her externally, she was fine and when he examined her vagina, he found she had lacerations which appeared fresh but there was no blood. He stated that the lacerations looked to have occurred 3 to 4 hours before she come to the hospital. He also stated that there were no sperms present and the prosecutrix tested HIV negative and he administered post-exposure proflaxis. He narrated that he later subjected the appellant to an HIV test and it come out positive.

2.13 Kabundi Kamulumba, a medical doctor at Choma General Hospital told the trial court that he observed that the prosecutrix had bruises in her

vagina but could not tell what caused them since there were allegations of sexual assault, he concluded that his findings were consistent with the complaint. He said that the prosecutrix had already lost her virginity but, there was a recent penetration which caused the fresh bruises. He also stated that there were no spermatozoa present.

2.14 PW10 was Inspector Sendoi Mukale, based at Victim Support Unit Choma. He told the trial court that he got the report from Nora Nyemu the mother to the prosecutrix. He warned and cautioned the appellant, interviewed him and after seeing the medical report he made up his mind to charge the appellant with the subject offence.

2.15 This marked the end of the prosecution case.

2.16 After considering the evidence of the prosecution witnesses, the trial court found the appellant with a prima facie case and was placed him on his defence. He opted to give evidence on oath and called no witnesses.

3.0 DEFENCE

3.1 In his defence, the appellant acknowledged meeting PW1 and PW2, told them to move away from the shops but they argued with him thus attracting the attention of the watchman. He told them that he should

not find them on his way from buying talk time. On his way back, he found them but he let them go. It was his further testimony, that the following day, he was apprehended and arrested around 19:00 hours in connection with this case. He told the trial court that he did not chase PW2 as he went with PW1.

3.2 In cross-examination, he stated that he sleeps alone and there is no one to confirm that he did not defile the prosecutrix.

4.0 FINDINGS AND DECISION OF THE LOWER COURT

4.1 The trial court considered the evidence on the record and found that the appellant had an encounter with PW1 and PW2. The trial court found that the appellant had a second encounter with PW1 in the absence of PW2 as evidenced by PW3. The court also found that there was overwhelming evidence that the appellant is the person who defiled the prosecutrix. The trial court found that his identity was not an issue and that he had the opportunity to commit this offence. On the strength of the cases of **David Phiri v The People**[1] and **Macheka Phiri v The People**[2] and the evidence on record, the trial court concluded that the state had proved its case beyond all reasonable doubt and found the appellant guilty of the offence of defilement.

4.2 Subsequently, the appellant was sentenced to 35 years imprisonment.

5.0 GROUND OF APPEAL

5.1 Embittered with the sentence, the appellant filed one ground of appeal couched as follows:

(1) The learned trial court erred when it sentenced the appellant to 35 years imprisonment with hard labour as the sentence was harsh and should come to this court as a sense of shock.

6.0 APPELLANT'S ARGUMENTS

6.1 Learned Counsel for the appellant Mrs. Lukwesa informed the Court that she will rely on the filed heads of arguments.

6.2 In support of the sole ground of appeal, learned counsel contended that the prosecutrix herein was aged 15 years 8 months at the date of the offence was committed, making this case a borderline one and hence ought not to attract a huge sentence. In support of this argument, we were referred to our judgment in the case of **Elias Phiri v The People**[3] where we started that 15 years is a borderline age.

6.3 The appellant further argued that there is no evidence on record to show that she was infected with any diseases and neither are there

any aggravating circumstances as observed by the trial court. It submitted that the trial court in imposing the sentence relied on the fact that was not correct. On the strength of holding in the case of **Gideon Hammond Millard v The People[4],** we were urged to interfere with the sentence of the lower court as it should come to us with a sense of shock.

7.0 RESPONDENT'S ARGUMENTS

7.1 On behalf of the respondent, learned Counsel Mr. S. Simwaka indicated that the state supports the conviction and the sentence of the appellant. It was contended that the sentencing judge did not err in law and that he was firm ground when he sentenced the appellant to 35 years with lard labour given the circumstances surrounding the appellant's commission of the offence.

7.2 According to counsel, the appellant did not only defile the prosecutrix but also abducted her, confined her and ill-treated her. It was counsel's contention that this when viewed in totality constitutes aggravating circumstances that a sentencing court should consider and justify a deterred sentence such as the one which the learned sentencing judge herein imposed. It was contended that this treatment was very

traumatizing to the prosecutrix who, at some point, even entertained thoughts of the possibility of being killed by the appellant. We were referred to our judgment in the case of **Try Hamenda v The People.**[5] In this case, we opined that:

> **"In this matter, there were aggravating factors, these being the age of the prosecutrix and the fact that the appellant abducted her and defiled her three times in the bush while he slapped and whipped her when she resisted the defilement. No doubt the defilement, coupled with the violent acts of slapping and whipping the prosecutrix traumatized her. It is therefore necessary to impose a deterrent sentence due to the aggravating factors in this matter. We find that the sentence of thirty years imprisonment with hard labour does not come to us with a sense of shock."**

7.3 It was further contended that considering the fact that the offence of defilement carries a maximum sentence of life imprisonment, 35 years with hard labour is neither excessive nor wrong in law, in fact or in principle. We were urged to dismiss the appeal and uphold the sentence of the lower court.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 We have carefully considered the evidence on the record, the arguments by both parties and the Judgment of the trial court.

8.2 The issue presented in this appeal relates to sentence only. It is trite that an appellate court should restrain itself from wantonly interfering with the sentence imposed by the trial court. The Court of Appeal, the precursor to the Supreme Court, guided appellate courts when dealing with appeals against sentence in the case of **Jutronich, Schutte and Lukin v The People[6],** to consider the following questions:

> **"(a) Is the sentence wrong in principle?**
> **(b) Is the sentence so manifestly excessive as to induce state of shock?**
> **(c) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?"**
> **Only if one or the other of these questions can be answered in the affirmative should the appellate court interfere."**

8.3 In this case, the appellant was sentenced to 35 years imprisonment with hard labour. The prosecutrix was aged 15 years 8 months at the time of the offence. This is clearly a borderline age as rightly argued by the learned counsel for the appellant.

8.4 The learned trial court when imposing the sentence in justifying the imposition of the sentence of 35 years relied on the fact that the appellant interrupted the prosecutrix who was on her way to school. This was clearly a mis-statement of the facts as she was instead on

her way from school. This mis-statement could have motivated the trial court to impose a more severe sentence.

8.5 Learned counsel for the respondent urged us to uphold the sentence and placed reliance on our decision in the case of **Try Hamenda** ***supra***. In that case, the prosecutrix was 12 years old, the appellant defiled her three times in the bush while he slapped her and whipped her when she resisted the defilement. We considered the circumstances aggravating and we declined to interfere with the 30 year sentence which was imposed on him.

8.6 The facts in this case are clearly different and the **Try Hamenda** case is inapplicable.

8.7 We agree with learned counsel for the appellant that the learned trial court erred when it placed reliance on none existing facts when imposing the sentence. We therefore find that the sentence imposed is wrong in principle and also comes to us with a sense of shock. We agree that there were some aggravating factors but certainly not justifying the imposition of the sentence herein. We allow the sole ground of appeal.

9.0 CONCLUSION

9.1 Having allowed the appeal against sentence, we quash the 35 years sentence. In deciding the sentence to impose, we have considered that the appellant is a first offender and a young man deserving leniency. We thus impose a sentence of 20 years imprisonment with hard labour.

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C. F. R. MCHENGA

COURT OF APPEAL JUDGE

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D. L. Y. SICHINGA, SC

COURT OF APPEAL JUDGE

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K. MUZENGA

COURT OF APPEAL JUDGE